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IN THE

Supreme Court of the United States

FREDERICK E. TONNIES; WILLIAM M. LEONHARDT; DAVID S. KAHL; ROBERT E. WILT; CLAY A. BERNICHON; SOLVEIG TSCHANN; FREDERICK W. HOPPE; LUDSON F. WORSHAM; EDWIN MARJALA; KENYON T. BEMENT; DONALD E. WAGNER; LUCIUS O. BROWNE, DONALD F. FABRY; THOMAS L. DURKIN, and BERNARD J. HART; individually and on behalf of all affected members of the Sperry, and Burroughs Classes,

Petitioners,

v.

UNISYS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Retired employees of Unisys Corporation claim that their employer – in breach of its ERISA fiduciary duty to provide accurate and complete benefits information – systematically assured them over a period of years, both orally and in writing, that their company medical coverage would continue after they retired at a fixed cost for the rest of their lives, and that the employer knew the employees were deciding to retire and making other important decisions after retirement based on these assurances, when in fact the retirees' medical benefits were subject to reduction or termination by the company at any time for any reason. The retirees sued within weeks of the company's first action exposing the fact that the assurances were false.

The questions presented are:

(1) *Whether a fiduciary defendant's knowing, systematic and repeated misrepresentations constitute either "fraud" or "concealment" within the meaning of the "fraud or concealment" tolling provision of ERISA's statute of limitations, or whether the tolling provision, despite its express disjunctive language ("fraud* ***or*** *concealment"), in all cases requires additional affirmative steps to conceal the breach, above and beyond the fiduciary misrepresentations themselves?*

(2) *Whether, as a matter separate from the application of the tolling provision, ERISA's six-year statute of limitations for breach of fiduciary duty can begin to run and expire even before the retirees first could have learned that the company's systematic assurances were false, and thus before they first could have been harmed (or recognized that they could be harmed) by the termination of their "lifetime" benefits?*

PARTIES TO THE PROCEEDING

Petitioners are former employees of Unisys Corporation and its predecessors, Sperry and Burroughs Corporations, who were participants in its ERISA plans providing medical benefits to retired former employees. The named plaintiffs in the consolidated, certified class actions below who are interested in the questions presented, and who are Petitioners here, are: Frederick E. Tonnies, William M. Leonhardt, David S. Kahl, Robert E. Wilt, Clay A. Bernichon, Solveig Tschann, Frederick W. Hoppe, Ludson F. Worsham, Edwin Marjala, Kenyon T. Bement, Donald E. Wagner, Lucius O. Browne, Donald F. Fabry, Thomas L. Durkin, and Bernard J. Hart, acting individually and on behalf of all members of the Sperry and Burroughs Classes who were affected by the orders and judgments appealed from. Named plaintiffs Ronald R. Bennett, Herman Hein, and Donald L. Thompson are members of the Unisys class who were named as appellants in the court below. However, they have no personal interest in the issues raised by the Petition and thus are not Petitioners in this Court.

Defendant below, Respondent here, is Unisys Corporation, the successor to the 1986 merger of the Sperry and Burroughs Corporations. Unisys was the sponsor and administrator of the ERISA employee benefit plans providing post-retirement medical benefits to retired employees of Unisys and its predecessors, and their eligible spouses and dependents.

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The appeal below arose from partial summary judgment dismissals of the claims of Petitioners and other members of the Sperry and Burroughs classes on the ground that their claims for fiduciary violations were time-barred under the ERISA statute of limitations governing fiduciary claims, § 413 of ERISA, 29 U.S.C. § 1113. Petitioners, former employees of Unisys or its predecessors who were participants in Unisys' retiree medical benefits plans, claim that Unisys violated its fiduciary duties under ERISA by systematically and repeatedly assuring them that their benefits would continue after they retired for life when in fact the benefits were subject to reduction or termination at any time for any reason, and that Unisys made these false assurances with knowledge that the retirees were relying on them in making decisions about when to retire and other personal matters.

Petitioners and the class members they represent are a sub-group of the plaintiffs in these consolidated actions who retired from the company before the end of 1986, more than six years before suit was filed. Like other retiree plaintiffs, Petitioners believed when they retired that their company medical benefits were secure for life, as Unisys had falsely assured them. They first learned that this belief was founded on misrepresentations when Unisys announced in November 1992, more than six years after they had retired, that it was going to terminate their medical plans over the next three years. Petitioners brought their lawsuits within weeks of this announcement.

Both lower courts sustained the viability of the retirees' breach of fiduciary duty claims with respect to all retirees who could show that they were harmed by the company's misrepresentations during the six years before the lawsuits were filed, such as by showing that, based on the misrepresentations, they retired earlier than they otherwise would have. Petitioners' claims based on their pre-November 1986 retirement decisions were dismissed, however, on statute of limitations grounds. Even though at the time they retired and continuing until the

Company's announcement in 1992 the retirees had every reason to believe Unisys' assurances, the lower courts held that (1) ERISA's six-year statute of limitations began to run when Petitioners retired and thus expired six years later (before the lawsuits were filed); and (2) the statute's tolling provision in the case of "fraud or concealment" did not apply to Petitioners' claims absent proof that Unisys took steps to conceal the breach, separate from the underlying misrepresentations.

OPINIONS BELOW

The opinion of the Court of Appeals for the Third Circuit, dated March 9, 2001, is reported at 242 F.3d 497 (3d Cir. 2001), 2001 U.S. App. LEXIS 3551, and 25 EBC 2105. The opinion is reprinted in the attached Appendix at 1a-45a. The May 30, 2001 order of the court of appeals denying the retirees' petition for rehearing and rehearing *en banc* appears at 91a-92a. The decision reviewed by the court of appeals, the March 10, 1997 ruling by the U. S. District Court for the Eastern District of Pennsylvania, is reported at 957 F. Supp. 628 (E.D.Pa. 1997) and reprinted in the Appendix at 46a-90a.

JURISDICTION

The judgment of the Court of Appeals for the Third Circuit was entered March 9, 2001. Petitioners timely sought rehearing and rehearing *en banc*. That petition was denied by order dated May 30, 2001. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTE INVOLVED

The relevant statute of limitations provision of the Employee Retirement Income Security Act of 1974 ("ERISA"), as amended, is § 413 of ERISA, 29 U.S.C. § 1113:

> **Limitation of actions.**
>
> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part,

> or with respect to a violation of this part, after the earlier of –
>
> (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
>
> (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

STATEMENT OF THE CASE

A. Statement of the Facts

Petitioners and the retirees they represent are former Unisys employees who retired more than six years before the lawsuits were filed in these consolidated class action cases. Both the district court and the court of appeals concluded that retirees in the class actions had viable claims for fiduciary breach under ERISA, based on record evidence that Unisys and its predecessors had knowingly engaged in "a systematic campaign of confusion" that misled the retirees into believing that their company-paid post-retirement medical benefits were guaranteed for life, when in fact the company had reserved the right to reduce or end the benefits at any time. *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation,* 57 F.3d 1255, 1260-61, 1266-67 (3d Cir. 1995) (referred to by the lower court as "*Unisys II*"), *cert. denied sub nom Unisys Corp. v. Pickering*, 517 U.S. 1103 (1996). The courts below also concluded that Unisys knew that the retirees were making critical decisions about retirement and other personal matters in the belief that their benefits were secure, and that Unisys perpetuated this confusion by repeating

the misrepresentations over a course of years and well into the six years preceding suit. *Unisys II*, 57 F.3d at 1266 (district court found that "the company, both actively and affirmatively, systematically misinformed its employees about the duration of their benefits by stating over and over, without qualification, that their benefits would continue for life"); *In Re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 1994 WL 284079 at * 25-27, 33, 1994 U.S. Dist. LEXIS 8549 at * 98-102, 121 (E.D.Pa. June 27, 1994) (misrepresentations so pervasive as to constitute a "systematic campaign of confusion"). Indeed, the evidence showed that Unisys was continuing to misrepresent the plan at least as late as August 1992, only three months before its November 3, 1992 announcement that it was terminating the plans. *See* Sperry Plaintiffs' Proposed Findings of Fact, filed March 2, 1994, at ¶ 41, D.Ct. Docket No. 98 (August 1992 company letter reiterating assurance of lifetime medical benefits).

The very fact that the first of the retirees' lawsuits was filed a mere two weeks after the 1992 announcement, and several others followed soon thereafter, shows that the retirees, as soon as their basis to sue became known, acted immediately by filing suit to protect their important benefits. Before this time, they had no reason to believe that the company's assurances were false or to foresee the possibility of injury.

B. District Court Proceedings.

The decision below arises from the district court's March 10, 1997 ruling, following remand from an initial round of appeals decided in 1995, granting Unisys' motion for partial summary judgment and dismissing the claims of certain retirees as barred by the ERISA statute of limitations. *See In re Unisys Corp. Retiree Medical Benefits ERISA Litigation*, 957 F. Supp. 628 (E.D.Pa. 1997), *rev'd*, 242 F.3d 497 (3d Cir. 2001). (District court opinion, 46a-90a.) The district court's jurisdiction over the federal questions presented by the cases was based upon 28 U.S.C. § 1331.

In 1996, Unisys moved for summary judgment on the ground that the ERISA statute of limitations governing fiduciary violations, 29 U.S.C. § 1113(1), barred the claims of all retirees who retired more than six years before the lawsuits were filed. The retirees responded that their claims were timely for two reasons. First, they contended that the "last action which constituted a part of the breach," 29 U.S.C. § 1113(1)(A), was the required claim element of "resulting harm" described in *Unisys II*, and did not occur until November 1992, when Unisys first acted contrary to its assurances and announced the phased termination of the plans. Second, the retirees urged that the six-year statute was tolled by the "fraud or concealment" provision until November 1992.

The district court nonetheless granted Unisys' motion for summary judgment and dismissed the claims of those retirees, the Petitioners herein, who retired more than six years before the lawsuits were filed. The court ruled that (1) the six-year statute began to run on the date of each retiree's retirement, not in November 1992, and that no other form of detrimental action by the retirees was cognizable as "resulting harm;" and (2) the "fraud or concealment" tolling provision did not apply. 957 F. Supp. at 634-37, 638-40, 54a-62a, 63a-70a.

C. Third Circuit Proceedings.

Following permission granted by the district court in September 1999 under F. R. Civ. P. 54(b), Petitioners appealed the dismissal of their claims to the Court of Appeals for the Third Circuit. That court (whose jurisdiction was based on 28 U.S.C. § 1291), rendered its decision on March 9, 2001, in an opinion authored by Judge Stapleton and joined by Judge Nygaard. Judge Mansmann authored a separate opinion concurring in the result, but disagreeing with the panel majority's rationale on the two statute of limitations questions presented. (Opinion at 24-35, 30a-45a). A timely petition for rehearing and rehearing *en banc* was denied by Order dated May 30, 2001 (91a-92a).

The court of appeals panel majority made two rulings with respect to the statute of limitations. First, with respect to the "last action which constituted a part of the breach" for purposes of determining when the ERISA six-year statute of limitations began to run, 29 U.S.C. § 1113(1)(A), the court affirmed the district court's ruling that the date of each retiree's retirement, as opposed to the 1992 announcement that the plans were being terminated, was the "resulting harm" that completed the fiduciary violation and thus marked the "last action which constituted a part of the breach." Opinion at 14-17, 17a-21a. While the court thus affirmed the rejection of Petitioners' *retirement-based* claims, it nevertheless reversed the district court's summary judgment ruling dismissing the claims. According to the court of appeals, retirements were not the *only* actions cognizable as "harm," and the court therefore remanded all of the claims for evaluation of evidence of such other forms of detriment that occurred within the six-year period preceding suit. Opinion at 17, 21a.[1]

Second, with respect to ERISA's "fraud or concealment" tolling exception, the panel majority read the statute to embody only the "fraudulent concealment" doctrine of common law, reasoning that it was bound to do so by the decision in *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996), that "there must be conduct beyond the breach itself that has the effect of concealing the breach from its victims" and "evidence that the defendant took affirmative steps to hide its breach of fiduciary duty." Opinion at 10, 12a. The court therefore disregarded the tolling provision's disjunctive language and affirmed the district court's ruling that the misrepresentations themselves, while knowing, systematic, misleading, and inconsistent with Unisys'

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1. All panel members agreed that in the case of any retiree who made economic or other personal decisions *during* retirement based on the misrepresentations, a six-year statutory period began to run on the dates of those decisions. Opinion at 17, A 21a. Accordingly, the panel ruled that the record did not permit any conclusion regarding the running of the six-year statute with respect to any retiree.

fiduciary duties, were not themselves sufficient to toll the statute *without proof of other affirmative steps to hide the breach.* (Opinion at 9-14, 10a-17a.). The court also ruled, however, that a retiree could come within the tolling exception with proof, for example, that a retirement counselor responded to questions about a reservation of rights clause by saying that it pertained to active employees but not to retirees. (Opinion at 13-14, 16a-17a). This was a second ground for reversing the district court's categorical grant of summary judgment, because the record contained proof that such acts had occurred. *Id.*

Judge Mansmann (author of both *Unisys II* and *In re Unisys Corp. Retiree Medical Benefit "ERISA" Litigation ("Unisys I")*, 58 F.3d 896 (3d Cir. 1995), concurred in the reversal of summary judgment but disagreed with the rationales stated by the panel majority. In Judge Mansmann's view, these rationales set the court on a decisional course directly contrary to ERISA's strong protective purposes by permitting the ERISA statute of limitations to become "an instrument to immunize fiduciary wrongdoing." (Opinion at 30, 38a). As Judge Mansmann explained:

> [T]he majority's analysis of the statute of limitations affords too little protection for trusting workers by using an artificial notion of detriment to start the statutory period, by disregarding the fiduciary's ongoing obligation to correct known misunderstanding, and by effectively writing out of the statute the doctrine of tolling until discovery of a self-concealing wrong.

(Opinion at 24, 30a).

While Judge Mansmann criticized the panel majority for "effectively read[ing] the element of harm or detriment out of the claim," the Judge considered "the most troubling aspect of the majority opinion" to be its requirement of "affirmative steps

to conceal beyond the misrepresentations themselves" in order to toll the statute. (Opinion at 29, 37a). According to Judge Mansmann:

> The "fraud or concealment" provision incorporates the long-established principle of federal common law that a statute of limitations is tolled until discovery of the wrong where there is either underlying fraud *or* separate acts to conceal wrongdoing.

(Opinion at 30, 38a). Emphasizing the statute's expressly disjunctive language, Judge Mansmann observed:

> The effect of the majority's requirement of additional acts of concealment even in cases of self-concealing fraud is to allow tolling only in cases of concealment, *and so to write the fraud alternative out of the statutory exception.*

(Opinion at 30 n.10, 38a, n.10 (emphasis added)). If there ever were a case calling for application of the "fraud or concealment" tolling provision, in Judge Mansmann's view, this is such a case. (Opinion at 33, 42a).

REASONS FOR GRANTING THE WRIT

I. THE DECISION BELOW IS IN CONFLICT WITH DECISIONS BY THIS COURT; AND THERE IS CONFLICT AND CONFUSION AMONG THE CIRCUIT COURTS OVER THE SCOPE OF ERISA'S PROVISION FOR TOLLING THE STATUTE OF LIMITATIONS IN CASES OF "FRAUD OR CONCEALMENT."

The Court should review this case to bring the law developed in the lower courts into conformity with its own decisions on equitable tolling, and to resolve disarray and conflict among the circuit courts regarding the principles governing ERISA's statute of limitations for fiduciary violations in cases where the injurious character of fiduciary

misrepresentations is not knowable until the truth is revealed or actual injury occurs. While this case itself raises two questions concerning application of the ERISA statute of limitations, resolution of these questions will serve to rationalize what is currently a conflicting and confused body of case law among the circuit courts concerning the accrual of ERISA claims for fiduciary misrepresentation and the tolling of the six-year limitations period (referred to in the statute as "fraud or concealment" but functionally equivalent to equitable tolling as defined in the decisions of the Court).

The first issue raised by the decision below calls for rules to identify the "last action" constituting a part of the breach of fiduciary duty that marks the accrual of the retirees' claims and starts the running of the applicable six-year statute of limitations. The retirees took the position below that the "last action" was the termination of the plans in November 1992, because no harm could have occurred or been foreseen by the retirees unless and until the company acted contrary to its assurances. The court of appeals rejected this position, and held instead that the "last action" occurred on the dates each retiree took action (by retiring or making other decisions) in reliance on the false assurances. The court fixed those dates as the dates of claim accrual despite the undisputed fact that, until the company announced more than six years later that the benefits were to be terminated, the retirees had no reason to suspect either that the assurances were false or that their own decisions in reliance on them would result in harm, and they therefore had no basis to sue.

The second issue raised by the decision below concerns the scope and proper application of ERISA's express tolling provision for the six-year limitations period "in the case of fraud or concealment." While the disjunctive language of the provision plainly calls for tolling where there is *either* "fraud *or* concealment" (emphasis added), the court of appeals disregarded this plain statutory directive and restricted tolling to cases of

"concealment" only, requiring affirmative conduct by the fiduciary to hide its breach, separate from the misrepresentations themselves.

Because the retirees agree with Judge Mansmann's concurring opinion that the panel's ruling on "fraud or concealment" tolling is the most troubling aspect of the decision, Petitioners address that issue first.

Determining the scope of ERISA's provision for tolling "in the case of fraud or concealment" presents two related questions. The first question is whether the tolling provision applies only in cases where there is "concealment," as the lower court held, or whether, as the statute's express disjunctive language seems to require, it also applies where there is "fraud" whether or not "concealment" is also present. The second question is whether, even if "concealment" of some kind is required, the tolling provision still applies if "self-concealment" is effected by the fiduciary misrepresentations, without the need for additional acts to hide the breach. Under the common law of fiduciary conduct that is a principal foundation for ERISA's fiduciary standards, misrepresentations by fiduciaries who have a duty to disclose are deemed "fraud" or "fraudulent concealment" without proof of additional acts of concealment.[2]

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2. On the question whether fiduciary misrepresentations are tantamount to "fraud," the state law cases are legion that misrepresentation by a fiduciary, or silence where the fiduciary has a duty to speak, is equivalent to fraud. *See, e.g., Auer v. Wm. Meyer Co.*, 54 N.E.2d 394, 401-03 (Ill. App. 1944) (fiduciary that violates trust guilty of fraud); *Dwyer v. Tracey*, 10 F.R.D. 115, 119 (N.D.Ill. 1950) (presumption of fraud when fiduciary profits at the expense of one that confides in it; laches does not bar action); *Amen v. Merced County Title Company*, 375 P.2d 33, 36 (Cal. 1962) (fiduciary relationship obviates necessity of pleading fraud; manifestly unjust to bar by limitations when claim resulted from fiduciary breach); *Sinclair v. Manufacturers Nat'l Bank of Detroit*, 223 N.W.2d 60, 61-62 (Mich. App. 1974) (plaintiff overcomes statute of limitations where co-executor fails to make fiduciary disclosures regarding estate assets; conduct is fraud); *Murphy*

(Cont'd)

Recognition of these standards as incorporated by the term "fraud or concealment" would plainly warrant the tolling Petitioners seek.

Both of these two related questions are fundamental points on which decisions of the courts of appeals are either in outright conflict or manifest significant analytical confusion. As Petitioners show below, the confusion stems in large part from a persistent misreading of this Court's decision in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879), and a disregard of the clear teaching of *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874), and *Holmberg v. Armbrecht*, 327 U.S. 392 (1946), which call out for this Court's review and correction.

(Cont'd)
v. Country House Inc., 240 N.W.2d 507, 511-12 (Minn. 1976) (citing, Prosser, *Torts*, Sec. 106 (4th ed. 1971)) (silence by fiduciary, even without affirmative misrepresentation or active concealment, constitutes fraud); *Constantine v. Piantedosi Baking Co.*, 1997 Mass. Super LEXIS 297 (Mass. Super. Ct. August 11, 1997) (statute of limitations tolled without actual fraud where defendant withholds facts in violation of duty to inform); *Boston Safe Deposit and Trust v. Seifert*, 1996 Mass. Super. LEXIS 682, *18, *32 (Mass. Super. Ct. February 17, 1996) (fundamental fairness dictates that discovery rule be applied to cause of action for breach of fiduciary duty to disclose because "a fiduciary's silence is equivalent to a stranger's lie").

Other decisions treat such fiduciary misrepresentations as "fraudulent concealment." *See, e.g., Guy v. Schuld*, 138 N.E.2d 891, 908-09 (Ind. 1956); *Sheets v. Burman*, 322 F.2d 277, 279 (5th Cir. 1963) (statute tolled until termination of fiduciary relationship); *Allen v. Webb*, 87 Nev. 261, 269, 485 P.2d 677 (Nev. 1971) (failure to disclose fiduciary breach is fraudulent concealment); *Ott v. Weinstock, M.D.*, 444 N.E.2d 1227, 1236 (Ind. App. 1983) (failure of fiduciary to disclose material information is fraudulent concealment); *Demoulas v. Demoulas Super Markets, Inc.*, 677 N.E.2d 159, 174 (Mass. 1997) (fiduciary's failure to adequately disclose facts constitutes fraudulent concealment) (citing, *Stetson v. French*, 321 Mass. 195, 199, 72 N.E.2d 410 (1947).

A. The Decision Below Conflicts With Decisions Of This Court Establishing That Fraud Or Concealment Tolls The Statute.

It is presumed that when Congress enacted ERISA in 1974 it was aware of the doctrine of equitable tolling that this Court had first recognized exactly 100 years earlier in *Bailey v. Glover*, 88 U.S. (21 Wall.) 342 (1874). The doctrine is straightforward. It encompasses both the doctrine of "fraudulent concealment" *and* the doctrine of "inherent fraud." In the former case, the plaintiff's ignorance of underlying fraud results from the defendant's affirmative acts to conceal pertinent facts. In the latter, the underlying wrong conceals itself and tolling occurs without regard to separate acts of concealment by the defendant. This Court explained the "inherent fraud" doctrine in *Bailey*:

> We also think that in suits in equity the decided weight of authority is in favor of the proposition that where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, *though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party.*

Id. at 348 (emphasis added; citations omitted). The doctrine followed, according to the Court's rationale, from the principle that statutes of limitations are meant to *prevent* frauds, not to assist them:

> To hold that by concealing a fraud, *or by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it*, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Id. at 349 (emphasis added). And the Court held that tolling was warranted either "when the fraud has been concealed, or is of such character as to conceal itself." *Id.* at 349-50.

Since its establishment in *Bailey*, this general rule of tolling in cases of fraud or concealment has been repeatedly reaffirmed by this Court and never modified. *See Exploration Co., Ltd. v. United States*, 247 U.S. 435, 449 (1918) (holding that when Congress passed the act in question, it was presumably with the rule of *Bailey* in mind); *Holmberg v. Armbrecht*, 327 U.S. 392, 397 (1946) (observing that the doctrine of equitable tolling "is read into every federal statute of limitations").[3] Accordingly, when Congress drafted the ERISA tolling provision to apply, disjunctively, "in cases of fraud or concealment," it must be presumed to have incorporated the broader rule stated in *Bailey*. *See N.L.R.B. v. Amax Coal Co.*, 453 U.S. 322, 331 (1981) (when Congress uses established terms, it intends to adopt the meaning of those terms unless it "has unequivocally expressed an intent to the contrary"). The court of appeals therefore had no basis

3. In applying this tolling doctrine, courts of appeals generally have used the terms "equitable tolling" and "fraud or concealment" interchangeably. *See, e.g., Sheet Metal Workers Local 19 v. 2300 Group, Inc.*, 949 F.2d 1274, 1279-80 (3d Cir. 1991), citing *Holmberg*, 327 U.S. at 397) (explaining that the tolling doctrine of "fraud or concealment" encompassed both the doctrine of "fraudulent concealment" and the "inherent fraud doctrine" under which deceit, intentional or unintentional, "without more, will toll the statute of limitations until such time as the fraud has been revealed or should have been revealed"); *Briley v. State of California*, 564 F.2d 849, 855 (9th Cir. 1977) ("The established rule, which we apply in this case, is that, where a plaintiff has been injured by fraud or concealment and remains in ignorance of it without any fault or want of diligence on his part, the statutory period does not begin to run until discovery of the injury." emphasis added; citing *Holmberg*); *Bowers v. Transportacion Maritima Mexicana, S.A.*, 901 F.2d 258, 264 (2d Cir. 1990) (statute tolled "with regard to federally created causes of action sounding in fraud or federally created causes of action which have been fraudulently concealed, until the fraud or concealment is, or in the exercise of reasonable diligence should have been, discovered").

for supposing that Congress meant to adopt a tolling provision that was more restrictive or for narrowing the tolling provision to cases of "concealment" only.

B. The Lower Courts' Requirement Of "Active Concealment" Results From A Misreading Of The Decisions Of This Court.

The court below drew its "active concealment" requirement from its earlier decision in *Kurz,* which in turn relied on the District of Columbia Circuit's decision in *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994). *Larson,* however, is one of a line of cases that depends on an erroneous reading of this Court's decision in *Wood v. Carpenter*, 101 U.S. (11 Otto) 135 (1879).

Wood was decided a mere five years after *Bailey* and concerned a narrow question under an Indiana statute providing for tolling in cases of *concealment* only. That statute provided for tolling where "any person liable to an action shall conceal the fact from the person entitled thereto." 101 U.S. at 138. In the course of its decision, the Court necessarily reviewed various Indiana decisions holding that "the concealment under [the Indiana statute], which will avoid the statute, must go beyond mere silence" or "must be the result of positive acts." 101 U.S. at 142, *citing Boyd v. Boyd*, 27 Ind. 429 (1867), and *Stanley v. Stanton*, 36 Ind. 445 (1871). Therefore, when the Court stated in *Wood* that "Concealment by mere silence is not enough. There must be some trick or contrivance intended to exclude suspicion and prevent inquiry," 101 U.S. at 143, it was summarizing its survey of the applicable Indiana law principles, not modifying the general tolling rule set forth in *Bailey*.

Soon after *Wood* was decided, the Court expressly limited its application in *Rosenthal v. Walker*, 111 U.S. 185 (1884), distinguishing it as based on Indiana law and explicitly noting that *Wood* had not made any reference to *Bailey* and could not be said to have "overrule[d] or modif[ied] it." 111 U.S. at 190-91. Indeed, this Court further observed in *Rosenthal* that

Bailey "ha[d] been often cited by this court, but has never been doubted or qualified." Since, under *Bailey* and subsequent decisions reconfirming the federal doctrine of equitable tolling, there is no requirement of "special circumstances or acts . . . to conceal" the underlying wrong, decisions imposing such a requirement on the mistaken authority of *Wood* are in direct conflict with the decisions of this Court.

Wood was imported into ERISA jurisprudence, nonetheless, in apparent unawareness that it was a limited decision based on an Indiana statute. The case was initially cited as an amplification of general federal doctrine by the District of Columbia Circuit in a civil rights case, *Hobson v. Wilson*, 737 F.2d 1, 33-35 (D.C. Cir. 1984), where, given the facts of the case, the court had no hesitation in concluding that the statute at issue was tolled. *Hobson* was then followed in an ERISA investment loss case, *Foltz v. U.S. News & World Report, Inc.*, 663 F. Supp. 1494, 1537 (D.D.C. 1987), where, again on the facts, the court concluded there was neither underlying fraud nor fraudulent concealment and that the statute therefore was not tolled. The Eighth Circuit cited both *Hobson* and *Foltz* in another ERISA case in which no underlying fraud was found, *Schaefer v. Arkansas Medical Society*, 853 F.2d 1487, 1491-92 (8th Cir. 1988). The court in *Schaefer* also concluded, as a matter of law, that section 413 also "incorporates the fraudulent concealment doctrine," which required proof of "a course of conduct designed to conceal evidence." None of these decisions, however, despite their direct or indirect reliance on *Wood*, established that misrepresentations themselves or other self-concealing wrongs could not constitute "fraud or concealment."

Radiology Center, S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990), was the first of the circuit court cases to raise the question (which the Seventh Circuit characterized as "one that has divided courts") of whether fraudulent conduct underlying an alleged breach of fiduciary duty can trigger tolling under the "fraud or concealment" provision. While the Seventh Circuit did not cite *Wood* directly,

it approvingly cited *Schaefer* (itself traceable to *Wood* through its reliance on *Hobson* and *Foltz*), for the conclusion that the tolling exception must be interpreted as incorporating only "the widely known doctrine of fraudulent concealment." *Id.* at 1220. The Seventh Circuit reasoned that because "fraud" was the basis for a cause of action but "concealment" was not, the provision must have been intended to refer to the single concept of fraudulent concealment rather than to give plaintiffs with fraud claims the benefit of tolling.

Two years later, the Seventh Circuit reviewed the tolling question again in *Martin v. Consultants & Administrators, Inc.*, 966 F.2d 1078 (7th Cir. 1992). In *Martin*, the court relied explicitly on *Wood*, which it mistakenly took to be a "refinement" of *Bailey*, and ruled that "fraud claims do not receive the [benefit of tolling] simply because they are fraud claims. There must be actual concealment – i.e., 'some trick or contrivance intended to exclude suspicion and prevent inquiry.'" *Id.* at 1094 & n.18, quoting *Wood*. In a concurring opinion, Judge Posner criticized the majority's use of the phrases "active concealment" and "self-concealing wrongs," noted that it was an open question whether an ERISA plaintiff could invoke general principles of "equitable tolling," and expressed his "regret [at] the failure to use this case as a vehicle for clarifying *issues that have been a recurrent source of uncertainty and confusion*." *Id.* at 1101, 1103-04 (emphasis added).

Finally, in *Larson v. Northrop Corporation*, 21 F.3d 1164, 1172-73 (D.C. Cir. 1994), the D.C. Circuit perpetuated the misreading of *Wood*, relying on the same line of cases (especially *Martin* and its direct quotations from *Wood*), and held that there must be "actual concealment" and "some trick or contrivance" to support tolling under ERISA. The Third Circuit relied heavily on *Larson* in *Kurz*, *supra*, and the panel majority in the decision below in turn deemed *Kurz* to be controlling. Opinion at 10-13, 10a-16a.

It thus is this misguided line of cases, from *Hobson* through *Kurz,* all flowing from a misreading of *Wood*, that led the court below to conclude that there could be no tolling without separate, affirmative acts of concealment. The conclusion is in direct conflict with *Bailey* and other decisions by the Court. It has no place under any federal statute, and certainly not under a protective statute like ERISA. If the lower court's decision is left uncorrected, this faulty reading of the "fraud or concealment" provision and misreading of *Wood* will continue to supplant the important equitable principles established in *Bailey.*

C. Even Apart From Their Misreading Of *Wood* And Disregard Of *Bailey*, The Decisions Of The Courts Of Appeals Are Marked By Analytical Confusion And Inconsistency.

As the preceding discussion of the cases suggests, there is confusion and inconsistency among the circuits concerning tolling under ERISA for "fraud or concealment." The existence of this conflict is explicitly recognized by the circuit courts themselves. For example, in *Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990), the Seventh Circuit noted that whether the "fraud or concealment" provision should be construed as referring to the conduct underlying the fiduciary breach or to "steps taken by wrongdoing fiduciaries to cover their tracks" is a question "that has divided courts." 919 F.2d at 1220. The court there cited *Diduck v. Kaszycki & Sons Contractors*, 874 F.2d 912, 919 (2d Cir. 1989) as standing for the broader view, and *Farrell v. Automobile Club,* 870 F.2d 1129, 1131 (6th Cir. 1989) and *Schaefer* as standing for the narrower one.

Indeed, in *Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 919-20 (2d Cir. 1989), the Second Circuit held that a breach of fiduciary duty arising from a trustee's failure to collect trust fund contributions and to list certain non-union workers on payroll reports to the funds was a straightforward case of "fraud or concealment," and that the statute of limitations

was tolled because the alleged breach of fiduciary duty "involved fraud or concealment." The Ninth Circuit employed a similar analysis in *Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1401 (9th Cir. 1995), ruling that "fraud or concealment" could be shown by "evidence of fraudulent activity or concealment." (In *Barker*, however, no such showing had been made.) And while the First Circuit in *J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245 (1st Cir. 1996), was not required to reach the question on the facts, it agreed with the analysis of the courts in *Diduck* and *Barker*, noting that "where courts differ is on how [the fraud or concealment provision] should be construed, specifically whether it includes both so-called 'self-concealing wrongs' as well as 'active concealment' that is separate from the underlying wrongdoing." *Id.* at 1253 n.9.

This confusion over the issues also surfaced in *Wolin v. Smith Barney Inc.*, 83 F.3d 847 (7th Cir. 1996), where the Seventh Circuit puzzled again (even after *Martin*) over which concept was intended by the statute's use of the term "fraud or concealment," and observed that "just how distinct from the original fraud the fraudulent concealment must be has troubled the courts." *Id.* at 851. After discussing at length the confusion in the case law and its blurring together of distinct but overlapping principles of the discovery rule, fraudulent concealment, "fraud or concealment," equitable tolling and equitable estoppel, the court again noted "continuing uncertainty" in the cases about their application. *Id.* at 853.

While Petitioners recognize, as discussed above, that the lower court is not alone in requiring active concealment in order for the tolling provision to apply, all such decisions follow from a demonstrably erroneous reading of *Wood*. And, as the circuit court decisions themselves attest, the case law is marked by considerable analytical confusion. The confusion results from the courts' unwarranted deviation from this Court's straightforward decision in *Bailey*. This trend should and can easily be dispelled by this Court's review.

II. THE DECISION BELOW THAT THE STATUTE OF LIMITATIONS RUNS FROM THE PETITIONERS' RETIREMENT DATES, BEFORE HARM COULD HAVE BEEN FORESEEN MUCH LESS SUFFERED, IS IN CONFLICT WITH DECISIONS OF THIS COURT AND OTHER CIRCUITS.

A. The Decision Below Conflicts With This Court's Standard Rule That A Limitations Period Cannot Commence Until The Plaintiff Has A Complete And Present Cause of Action

Separate from the tolling issue, this Court should review the lower court's decision that the six-year statute of limitations for breach of fiduciary duty, which runs from "the date of the last action which constituted *a part of* the breach or violation," 29 U.S.C. § 1113(1)(A) (emphasis added), began to run in the present case "no later than the date upon which the employee relied to his detriment on the misrepresentations." Opinion at 15, 19a. Given the lower court's 1995 decision in this case establishing "resulting harm to the employees" as a discrete element of the fiduciary breach (57 F.3d at 1265), the lower court's "last action" ruling conflicts with this Court's holding in *Bay Area Laundry and Dry Cleaning Pension Trust Fund v. Ferbar Corp.*, 522 U.S. 192 (1997) that:

> [T]he limitations period commences when the plaintiff has "a complete and present cause of action." . . . Unless Congress has told us otherwise in the legislation at issue, a cause of action does not become "complete and present" for limitations purposes until the plaintiff can file suit and obtain relief.

522 U.S. at 201. Until Unisys' November 1992 repudiation of its assurances, there was no complete or present cause of action, as Petitioners had not suffered any harm nor had any basis to sue. As of November 1992, that is, they were continuing to receive the benefits that the company had assured them would

continue for life, and Unisys was continuing to give its false assurances that this was so. There was accordingly no basis for the retirees to prove the requisite "resulting harm" and obtain relief.

B. The Lower Court Ruling Is Also In Conflict With This Court's Rule That A Cause Of Action Does Not Accrue Until An Injury Has Been Suffered And Discovered, Or Where Injury Is Contingent On The Defendant's Future Conduct.

The lower court's ruling is also contrary to the settled rules that a cause of action does not accrue either until an injury has been suffered and discovered (*see, e.g., Rotella v. Wood*, 528 U.S. 549, 555 (2000), referring to "traditional federal accrual rule of injury discovery" under which "discovery of the injury, not discovery of the other elements of a claim, is what starts the clock"), or where the injury is contingent on the defendant's future conduct (*see Texas v. United States,* 523 U.S. 296, 300 (1998), cited by Judge Mansmann for the proposition that a claim is not ripe for adjudication if it rests upon "contingent future events that may not occur as anticipated, or indeed may not occur at all." Opinion 25, 32a). Here, as noted, resulting harm was contingent on the company's future conduct. No harm had occurred when Petitioners retired.

C. The Decision Below Conflicts With Decisions By Other Courts Of Appeals Holding that A Claim Does Not Accrue Until The Plan Or Fiduciary Has Repudiated The Plaintiff's Rights.

The lower court's decision also conflicts with decisions of other appeals courts. In the specific context of ERISA claims for benefits (as opposed to cases involving imprudent investments and similar misconduct), the accepted rule is that a claim does not accrue until the plan or fiduciary has repudiated the plaintiff's rights to benefits. *See Carey v. IBEW Local 363 Pension Plan*, 201 F.3d 44, 47-48 (2d Cir. 1999); *Union Pac. R.R. v. Beckham*, 138 F.3d 325, 330-31 (8th Cir. 1998); *Daill v. Sheet Metal Workers' Local 73 Pension Fund*, 100 F.3d 62,

65-67 (7th Cir. 1996); *Martin v. Construction Laborer's Pension Trust*, 947 F.2d 1381, 1384-86 (9th Cir. 1991); *Miles v. New York State Teamsters Conf. Pension & Retirement Fund Employee Pension Benefit Plan*, 698 F.2d 593, 598 (2d Cir. 1983); *Paris v. Profit Sharing Plan for Employees of Howard B. Wolf, Inc.*, 637 F.2d 357, 361 (5th Cir. 1981); *see also Connors v. Hallmark & Sun Coal Co.*, 935 F.2d 336, 342 (D.C. Cir. 1991) (Ginsburg, J.) ("the discovery rule is the general accrual rule in federal courts" and is "consistent with Congress' intent in ERISA to provide 'broad remedies' and 'to remove procedural and jurisdictional obstacles'"). This is so whether or not a formal demand has been made or denied. *Id.*

Under these decisions, ERISA thus affords a benefits claimant the opportunity to learn that there is a claim before the claim will be deemed to accrue. Yet, under the contrary rule adopted here by the lower court, the statute of limitations has been transformed into a refuge for fiduciaries who lie.

D. The Lower Court Ruling Spawns Undesirable Problems For Courts and Litigants.

Finally, the lower court's rule creates new and undesirable problems for courts and litigants. Treating the act of retirement itself as "detrimental reliance" calls for a characterization that can only be made in hindsight after other contingent events have occurred. In this case, there is no dispute that there was no "detriment" to the retirees when they retired, or for so long as Unisys conformed its conduct to its assurances and continued to provide their benefits. The panel majority concedes this point when it agrees with Judge Mansmann that a retiree who died before the benefits were terminated, and thus received all promised benefits, "would have no claim" because he would have suffered no harm. Opinion at 15-16 n.7, 19a. The court nonetheless offers no criteria for determining when and why reliance becomes "*detrimental*" where the detriment depends on contingent future acts that not only may never occur, but are unforeseen. Indeed, the lower court constructs a framework

under which, it acknowledges, the statute of limitations could begin to run even before a fiduciary breach claim has accrued. Opinion at 16 n. 8, 20a.

As a result, the lower court's analysis has the extremely undesirable consequence of spawning unnecessary litigation. Any representation (or omission) could be deemed subject to the lower court's "assume the fiduciary is lying" accrual rule. Every employee could risk the loss of judicial remedies so long as the defendant can allow six years to pass before repudiating a false assurance about benefits. Employees could thus be compelled to commence litigation to test the fiduciary's representations even when they have no basis to doubt them.

These problems are not found in pre-ERISA law. Even in garden variety fraud cases involving parties not in a fiduciary relationship, the discovery rule protects plaintiffs by affording them adequate time to sue. And under the common law of trusts that is the basis for ERISA's fiduciary standards, a fiduciary's affirmative misrepresentation, or even non-disclosure of material information that the fiduciary has a duty to provide, constitutes "fraud or concealment" for purposes of tolling. *See* note 3 above.

This Court has emphasized that ERISA imposes "strict standards" on benefits plan administrators and other fiduciaries, *Central States, Southeast & Southwest Areas Pension Fund v. Central Transport, Inc.*, 472 U.S. 559, 570-72 & n.10 (1985), "[t]o help fulfill ERISA's broadly protective purposes." *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 96 & n.5 (1993). Courts should accordingly avoid interpretations of ERISA "that would afford less protection to employees . . . than they enjoyed before ERISA was enacted." *Firestone Tire & Rubber Co. v. Bruch*, 489 U.S. 101, 113-14 (1989). Yet the lower court's framework for accrual of ERISA fiduciary misrepresentation claims violates this principle. It allows the statute of limitations to expire before possible discovery, or even accrual, of a complete and present claim. And it requires courts to immunize fiduciary misrepresentations

as long as the fiduciary has allowed six years to pass. There is no basis to conclude that Congress intended this result when it enacted ERISA to protect the interests of employees.

These are critical questions, as to which analytical confusion prevails in the lower courts. The Court should intervene to settle them.

CONCLUSION

For the foregoing reasons, Petitioners respectfully pray that the Petition be granted and that a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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APPENDIX

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DATED AND FILED MARCH 9, 2001, AS AMENDED MARCH 20, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-1929

IN RE: UNISYS CORP. RETIREE MEDICAL BENEFIT "ERISA" LITIGATION; FREDERICK E. TONNIES; WILLIAM M. LEONHARDT; DAVID S. KAHL; ROBERT E. WILT; CLAY A. BERNICHON; SOLVEIG TSCHANN; FREDERICK W. HORPE; LUDSON F. WORSHAM; EDWIN MARJALA; KENYON T. BEMENT; DONALD E. WAGNER; LUCIUS O. BROWNE, DONALD F. FABRY; THOMAS L. DURKIN; BERNARD J. HART; RONALD R. BENNETT; HERMAN HEIN; DONALD L. THOMPSON, individually and on behalf of all members of the Sperry, Burroughs and Unisys Classes,

Appellants

Argued July 18, 2000

Opinion Filed March 9, 2001 (as amended March 20, 2001)

BEFORE: MANSMANN, NYGAARD and STAPLETON, Circuit Judges. MANSMANN, Circuit Judge, concurring in part, and concurring in the result in part.

Appendix A

OPINION OF THE COURT

STAPLETON, *Circuit Judge*:

We are asked to review two orders granting partial summary judgment to the defendant in this ERISA action.* Review of one order requires us to interpret ERISA's statute of limitations for breach of fiduciary duty claims, 29 U.S.C. § 1113. Review of the other requires us to determine whether the defendant fiduciary, if found to have made material misrepresentations to the plaintiffs, may be held accountable to those plaintiffs who relied to their detriment in making decisions other than decisions to retire.

I.

The factual and procedural history of this case is extensive and has been recounted elsewhere in detail.[1] We will explain only the status of the case as it comes to us on

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* These two orders were issued by the Honorable Edward N. Cahn, former Chief Judge of the United States District Court for the Eastern District of Pennsylvania. *In re Unisys Corp.*, 957 F. Supp. 628 (E.D. Pa. 1977). The Honorable Bruce W. Kauffman, United States District Judge for the Eastern District of Pennsylvania, subsequently certified the order as final and appealable under Federal Rule of Civil Procedure 54(b). *In re Unisys Corp.*, 189 F.R.D. 149 (E.D. Pa. 1999).

1. *See e.g., In re Unisys Corp.*, 57 F.3d 1255, 1257-61 (3d Cir. 1995), *cert. denied sub nom, Unisys v. Pickering*, 517 U.S. 1103, 134 L. Ed. 2d 470, 116 S. Ct. 1316 (1996); *In re Unisys Corp.*, 957 F. Supp. 628, 631-32 (E.D. Pa. 1997); *In re Unisys Corp.*, 837 F. Supp. 670, 672 (E.D. Pa. 1993), *aff'd*, 58 F.3d 896 (3d Cir. 1995).

this appeal. This is a class action filed on behalf of retirees and disabled former employees of the Sperry, Burroughs, and Unisys Corporations ("retirees" or "plaintiffs") against Unisys Corporation ("Unisys"). The dispute arises out of Unisys' termination of its post-retirement medical plans for retirees and disabled former employees of the three companies.

On November 3, 1992, Unisys announced that it would terminate all of its preexisting medical benefit plans and replace them with a new one effective January 1, 1993.[2] Under the majority of the old plans, Unisys paid the entire medical premium for the lives of the retirees and provided continuing benefits for their spouses. The new plan, in contrast, required the retirees to contribute escalating amounts to the cost of the premiums until January 1, 1995, at which time the retirees would become responsible for the entire premium.

Upon learning about this planned change in retirement benefits, retirees of Sperry, Burroughs, and Unisys separately filed eight different lawsuits against Unisys in four jurisdictions. *See In re Unisys Corp.*, 837 F. Supp. 670,

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2. In September 1986, Sperry Corporation and Burroughs Corporation merged to form Unisys Corporation. Following the merger, Unisys maintained the preexisting medical benefit plans of its component corporations until 1989. That year, Unisys created its own Post-Retirement and Extended Disability Medical Plan to cover employees who retired after April 1, 1989, most of whom were former Sperry and Burroughs employees. Even with the addition of the new plan, however, Unisys kept its predecessor plans intact.

672 n.1 (E.D. Pa. 1993) (citing cases). These lawsuits were eventually consolidated. The retirees asserted three causes of action: breach of contract, estoppel, and breach of fiduciary duty.

The District Court granted summary judgment to Unisys on the breach of contract claims of the Burroughs and Unisys retirees, as well as on the estoppel and breach of fiduciary duty claims of all plaintiffs. *See In re Unisys Corp.*, 837 F. Supp. 670 (E.D. Pa. 1993). After a non-jury trial, the District Court granted judgment to Unisys on the contract claims of the Sperry retirees. *See In re Unisys Corp.*, 1994 U.S. Dist. LEXIS 8549, 1994 WL 284079 (E.D. Pa.).

During the trial, Unisys relied upon the fact that the applicable ERISA plans and summary plan descriptions ("SPDs") contained a reservation of rights clause, reserving to Unisys the right to amend or terminate the plan at any time for any reason. The Sperry retirees advanced two theories in response. The first was that, when the applicable ERISA plans and summary plan descriptions described the health care benefits as "lifetime" benefits, this was intended to convey not only that the existing plan provided such benefits for life but also that those benefits were vested, i.e., guaranteed against change. The second theory "was that although the SPDs used lifetime language to describe the benefits of [both] actives and retirees, Sperry had an unwritten 'practice' or 'policy' that once an individual retired, his/her benefits 'locked in.' Pursuant to this 'lock in' policy, the company could not reduce the medical benefits of retirees under any circumstances." *In re Unisys Corp.*, 1994 U.S. Dist. LEXIS 8549, *85, 1994 WL 284079 at *23.

Appendix A

At the seven day trial, the District Court admitted and considered extrinsic evidence tendered to show Unisys' intent in promulgating the plans. The Court concluded that "lifetime benefits" as used in the plans and SPDs did not reflect an intent to create "vested" lifetime benefits, observing that "the plaintiffs conceded throughout the entire trial that an active employee's benefits could always be awarded or terminated even though lifetime language was similarly used to describe that benefit . . . implicitly recognizing that lifetime is not synonymous with vested." 1994 U.S. Dist. LEXIS 8549, *84. With respect to the plaintiffs' second theory, the District Court found no evidence of a corporate practice or policy of "locking-in" benefits at retirement, noting that "not a single document corroborated the testimony that an active/retiree distinction was in force." 1994 U.S. Dist. LEXIS 8549, *86.

The District Court's ultimate conclusion at the end of the trial was that the plaintiffs lacked any contract right to lifetime benefits. The evidence that it heard and our intervening decision in *Bixler v. Cent. Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), however, caused it to reconsider its summary judgment in Unisys' favor on the Sperry plaintiffs' breach of fiduciary duty claims. Ultimately, it reinstated those claims.[3] In the course of doing so, it pointed to evidence that (1) a "retirement counselor [had] responded to questions about the reservation of rights clause raised by potential retirees by saying that

3. After we affirmed this decision, the District Court reinstated the similar claims of the Burroughs and Unisys retirees as well. *In re Unisys Corp.*, 1996 U.S. Dist. LEXIS 11781, 1996 WL 455968 (E.D. Pa.).

the language 'pertained to active employees and not to retirees' ", and (2) a "personnel manager . . . admitted to routinely telling inquiring employees that their post-retirement medical benefits were 'guaranteed to them for life.' " "The Court described this evidence as "just a small sample of the evidence on this issue." *In re Unisys Corp.*, 1994 U.S. Dist. LEXIS 8549, *102 n.69, 1994 WL 284079 at *34 n.69. The Court also referenced evidence indicating "the highest levels of corporate management at Sperry, and later Unisys, recognized that employees might be under the mistaken belief that 'lifetime' meant forever." 1994 U.S. Dist. LEXIS 8549, *98. The Court explained its reinstatement decision by stating "that based on [this] evidence and the law in this circuit, it seems possible that at least some plaintiffs will be able to sustain a [breach of fiduciary duty] claim." 1994 U.S. Dist. LEXIS 8549, *103.[4] The Court declined, however, to reinstate the estoppel claims.

An interlocutory appeal followed, bringing before us the judgments in Unisys' favor on the contract and estoppel claims and the decision to reinstate the breach of fiduciary duty claims. We found judgment appropriate on the breach of contract claim because the plans and SPDs provided unambiguous notice that lifetime medical benefits were not guaranteed, even for those who retired when the plans still provided for such benefits. On the unambiguous face of the plans, there was no right to lifetime medical benefits and extrinsic evidence should not be considered. *See In re Unisys Corp.* ("*Unisys I*"), 58 F.3d 896, 904-06 (3d Cir. 1995).

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4. At the same time, the Court stressed that the breach of fiduciary duty claim was not before it and that it was "not holding that a breach did in fact occur." 1994 U.S. Dist. LEXIS 8549, *103.

Appendix A

We found that summary judgment was appropriate on the retirees' estoppel claim as well:

> Due to the unambiguous reservation of rights clauses in the summary plan descriptions by which Unisys could terminate its retiree medical benefit plans, the regular retirees cannot establish "reasonable" detrimental reliance based on an interpretation that the SPDs promised vested benefits. The retirees' interpretation of the plans as providing lifetime benefits is not reasonable as a matter of law because it cannot be reconciled with the unqualified reservation of rights clauses in the plans.

Unisys I, 58 F.3d at 907.

In a separate opinion, we also upheld the District Court's reinstatement decision. *See In re Unisys Corp.* ("*Unisys II*"), 57 F.3d 1255 (3d Cir. 1995). We did so because the record suggested that some retirees might be able to show one or both of the following: (1) Unisys representatives counseled them that they had lifetime medical benefits without making reference to the reservation of rights clause, even though the representatives were aware that many employees mistakenly understood such counsel to mean that such benefits became vested at the time of retirement, see id. at 1260-61; and (2) Unisys representatives "affirmatively represented to them that their medical benefits were guaranteed once they retired, when the company knew in fact this was not true." *Id.* at 1266-67. We held that such conduct could constitute a breach of Unisys' fiduciary duty as plan administrator.

Appendix A

After the breach of fiduciary duty claim was reinstated for all classes of plaintiffs, Unisys filed two motions for partial summary judgment. At the same time, the Sperry retirees submitted a motion for summary judgment on their claims. In its first motion, Unisys asked the District Court to grant it summary judgment against all Sperry retirees who retired before November 17, 1986 (six years before the first complaint by Sperry retirees was filed), and against all Burroughs retirees who retired before December 3, 1986 (six years before the first complaint by Burroughs retirees was filed). Unisys argued that these plaintiffs were barred from having their claims heard by ERISA's statute of limitations, 29 U.S.C. § 1113.

In its second motion, Unisys sought to have the District Court grant summary judgment against all the plaintiffs who would not be able to prove that Unisys' alleged breach of fiduciary duty led them to retire earlier than they otherwise would have (e.g., retirees who did not voluntarily retire). It argued that the only legally cognizable harm that could have resulted from its alleged misrepresentations was acceleration in individual decisions to retire. Other decisions made by the plaintiffs in reliance on Unisys' misrepresentations, Unisys contended, should not be considered a "resulting harm" of the alleged breach of fiduciary duty.

In support of their summary judgment motion, the Sperry retirees argued that there is no material dispute of fact as to any of the elements of their breach of fiduciary duty claims. Accordingly, they urged the District Court to grant them judgment as a matter of law.

Appendix A

The District Court granted Unisys' motions for partial summary judgment and denied summary judgment to the Sperry retirees on their motion. Those retirees whose claims were extinguished by the partial summary judgments in Unisys' favor then successfully moved under Fed. R. Civ. P. 54(b) for the entry of a final judgment on their claims so they could prosecute this appeal. *See In re Unisys Corp.*, 189 F.R.D. 149 (E.D. Pa. 1999).

II.

Section 1113 of ERISA, 29 U.S.C. § 1113 states, in its entirety:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation under this part, or with respect to a violation of this part, after the earlier of
>
> > (1) six years after (A) the date of the last action which constituted part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;

> except that in the case of fraud or concealment, such actions may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113.

The retirees argue that the District Court misapplied § 1113 in two respects. First, they argue that the Court erred in refusing to hold that under the "fraud or concealment" provision, the limitations period did not end until six years after they discovered the truth about their health care benefits. In the alternative, the retirees argue that even if we find the "fraud or concealment" provision inapplicable here, their claims are nevertheless timely under the six-year provision provided in § 1113(1)(A), which does not begin to run until "the date of the last action which constituted a part of the breach or violation." The retirees contend that the date of the last action constituting part of the breach in this case was the date on which Unisys terminated the old benefit plans.

A. "Fraud or Concealment"

The purpose of the "fraud or concealment" provision is to codify a portion of the common law for ERISA breach of fiduciary duty claims. The issue raised by this provision is not simply whether the alleged breach involved some kind of fraud but rather whether the fiduciary took steps to hide its breach so that the statute should not begin to run until the breach is discovered. As we explained in *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544 (3d Cir. 1996):

> We now join our sister courts and hold that § [1113]'s "fraud and [sic] concealment" language applies the federal common law discovery rule to ERISA breach of fiduciary duty claims. In other words, when a lawsuit has been delayed because the defendant itself has taken steps to hide its breach of fiduciary duty, . . . the limitations period will run six years after the date of the claim's discovery. The relevant question is therefore not whether the complaint "sounds in concealment," but rather whether there is evidence that the defendant took affirmative steps to hide its breach of fiduciary duty.

Id. at 1552.

In *Kurz*, the alleged breach of fiduciary duty was the counseling of employees considering retirement about their retirement benefits without revealing that plan amendments to increase those benefits were under serious consideration. Because the "wrong . . . was neither self-concealing nor actively concealed, we expressly reserved the issue, elsewhere debated, of "whether § [1113]'s six year period extends to both 'self-concealing' wrongs as well as 'active concealment' separate from the underlying wrongdoing." *Id.* at 1552. In this context, "a self-concealing act is an act committed during the course of the original fraud that has the effect of concealing the fraud from its victims, while active concealment refers to acts intended to conceal the original fraud that are distinct from the original fraud." *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996). We held in *Kurz* that, regardless of whether the acts to conceal

the breach occur in the course of the conduct that constitutes the underlying breach or independent of and subsequent to the breach, there must be conduct beyond the breach itself that has the effect of concealing the breach from its victims.

Here, as in *Kurz*, the issue is "not whether the complaint 'sounds in concealment' [i.e., not whether Unisys misadvised the retirees or counseled them without drawing attention to the reservation of rights clause], but rather whether there is evidence that the defendant took affirmative steps [at any point] to hide its breach of fiduciary duty." 96 F.3d at 1552 (emphasis added). Accordingly, if all that a plaintiff can show is that a counselor represented to him that he had guaranteed lifetime health care benefits or failed to give him accurate advice knowing that he believed he had such benefits, the fraud or concealment clause is inapplicable. In such cases, Unisys cannot be said to have taken affirmative steps, either as a part of the original breach of duty or thereafter, to cover up its breach. To the contrary, pursuant to the relevant provisions of ERISA, Unisys regularly distributed to its employees and retirees SPDs unambiguously explaining that the plan provisions calling for lifetime benefits could be amended at any time for any reason. As the District Court aptly put it,

> While . . . compliance with SPD disclosure obligations does not relieve a company of its fiduciary duty to avoid confusing participants about their benefits, this court will not hold that the truth about the "lifetime" benefits was concealed from participants when the information about the reservation of rights clause was

> unambiguously printed and distributed [by the company] in the SPD.

In re Unisys Corp., 957 F. Supp. at 635. Accordingly, we hold that the "fraud or concealment" provision of § 1113(2) is inapplicable to such cases.[5]

It is true, as retirees stress, that the doctrine of equitable tolling can under some circumstances prevent a limitations period from running in favor of a trustee on a breach of fiduciary duty claim even in the absence of concealment on his part. *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 22 L. Ed. 636 (1875), upon which plaintiffs heavily rely, provides one example of such circumstances. We conclude, however, that superimposing such equitable tolling rules on the statutory limitations scheme set forth in § 1113 would be inconsistent with congressional intent and the clear teachings of the Supreme Court.

In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson*, 501 U.S. 350, 360-62, 115 L. Ed. 2d 321, 111 S. Ct. 2773 (1991), the Court held that Rule 10(b)(5) misrepresentation claims are governed by § 9(e) and § 18(c) of the Securities and Exchange Act, each of which requires that suit be filed before the earlier of (a) one year from the discovery of the facts constituting the violation or (b) three years from "the violation" (or, in the case of § 18(c), from

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5. Notwithstanding plaintiffs' argument to the contrary, we do not regard the fact that the alleged misrepresentations were repeated (as opposed to isolated) as satisfying the requirement that there be affirmative steps to conceal beyond the misrepresentations themselves.

the date "the cause of action accrued"). The plaintiff there argued that the doctrine of equitable tolling should apply so that the three-year limitations period would not start to run until the fraud was discovered even where no steps where taken by the defendant to conceal the fraud. The Court rejected that argument, finding it fundamentally at odds with the legislative scheme:

> Plaintiff-respondents note, correctly, that "time requirements in lawsuits . . . are customarily subject to 'equitable tolling.' " *Irwin v. Department of Veterans Affairs*, 498 U.S. 89, 95, 111 S. Ct. 453, 112 L. Ed. 2d 435 (1990), citing *Hallstrom v. Tillamook County*, 493 U.S. 20, 27, 107 L. Ed. 2d 237, 110 S. Ct. 304 (1989). Thus, this Court has said that in the usual case, "where the party injured by the fraud remains in ignorance of it without any fault or want of diligence or care on his part, the bar of the statute does not begin to run until the fraud is discovered, though there be no special circumstances or efforts on the part of the party committing the fraud to conceal it from the knowledge of the other party." *Bailey v. Glover*, 88 U.S. 342, 21 Wall. 342, 348, 22 L. Ed. 636 (1875); *see also Holmberg v. Armbrecht*, 327 U.S. 392, 396-397, 90 L. Ed. 743, 66 S. Ct. 582 (1946). Notwithstanding this venerable principle, it is evident that the equitable tolling doctrine is fundamentally inconsistent with the 1-and-3-year structure.

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling. One commentator explains: "The inclusion of the three-year period can have no significance in this context other than to impose an outside limit." . . . Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.

501 U.S. at 363.

Although the specified duration of the limitations periods here is different, the legislative scheme is the same. Congress has determined that the cut-off date should be the earlier of (a) three years from the date of discovery of the claim and (b) six years from the violation. The only difference is that ERISA's statute makes a single express exception for cases of "fraud or concealment." Just as in *Lampf*, it would be fundamentally inconsistent with the statutory scheme here to accept the argument that the six-year period does not begin to run until discovery of the fraud, where the defendant has engaged in no wrongful activity beyond the original fraud on which the plaintiffs' claims are based. Indeed, given the fact that Congress provided one express exception in § 1113(2), rejection of equitable tolling here follows *a fortiori* from the Supreme Court's holding in *Lampf*.

Similarly, we must decline plaintiffs' invitation to apply their equitable tolling principles under the guise of construing § 1113(2)'s "fraud or concealment" provision. Accepting that

invitation would require us to reject *Kurz*, and we are bound by that precedent. Contrary to plaintiffs' suggestion, we do not read our subsequent case law as diluting the significance of *Kurz* in the context of this case.[6]

This does not end the matter, however. Unlike the District Court, we are unwilling to say based on the current record that no retiree will be able to successfully invoke the "fraud or concealment" provision of § 1113(2). As we have noted, the District Court, when deciding to reinstate the breach of fiduciary duty claims, pointed to evidence suggesting that a "retirement counselor [had] responded to questions about the reservation of rights clause raised by potential retirees by saying that the language pertained to active employees and not to retirees." *In re Unisys Corp.*, 1994 U.S. Dist. LEXIS 8549, *100 n.69, 1994 WL 284079 at *34 n.69. It seems to us entirely possible that advice of this character might well bring the fraud or concealment provision into play. If, for example, advice about the reservation of rights clause was given under circumstances such that an employee, who had consulted the SPD, was

6. In particular, plaintiffs point to this Court's decision in *Adams v. Freedom Forge Corp.*, 204 F.3d 475 (3d Cir. 2000). As we expressly noted, no statute of limitations issue was before us in that appeal. Although a footnote in that case makes reference to "issues left unresolved in *Kurz* about the anatomy and scope of the fraudulent concealment doctrine," i.e., whether ERISA's statute of limitations applies to "self-concealing" as well as "active concealment" cases, id. at 494 n.5 (full citations and internal quotations omitted), we do not read *Adams* as purporting to second guess the *Kurz* rule that the "fraud or concealment" provision requires "affirmative steps to hide [the] breach of fiduciary duty." *Kurz*, 96 F.3d at 1552.

dissuaded from consulting counsel regarding that clause, we believe that the advice could appropriately be regarded as an affirmative step having the effect of concealing Unisys' breach.

It would be inappropriate for us to decide at this stage whether "fraud or concealment" within the meaning of section 1113(2) has occurred in this case. We hold only that, drawing all permissible inferences against the party seeking summary judgment, there may be retirees who will be able to prove that Unisys counselors concealed their breach from them and that the limitation period did not foreclose suit until six years after the date they discovered the breach had occurred.

B. "Date of the last action which constituted part of the breach"

Having concluded that the six-year limitations period is applicable to plaintiffs' claims, we must determine when that period began to run, i.e., "the date of the last action which constituted a part of the breach." Unisys insists that this text focuses on the last action of the fiduciary which was in violation of its fiduciary duty. While it does not maintain that the current record pinpoints the date upon which the last alleged misrepresentation was made, it correctly points out that insofar as decisions to retire are concerned, a retiree's date of retirement is necessarily the last date upon which Unisys could have made a relevant misrepresentation or upon which a clarifying communication could have prevented detrimental reliance. Unisys therefore asks us to affirm the District Court's grant of summary judgment against those

members of the plaintiffs' class who retired more than six years before the date on which their case was originally filed, in 1992.

The retirees, on the other hand, contend that the date of the last action which constituted part of the breach was November 3, 1992, the date on which Unisys announced the termination of its "lifetime" plans. They argue that § 1113 must be interpreted in this manner because no actual harm occurred and thus no legitimate claim of breach of fiduciary duty arose until Unisys terminated the plans that it initially had misrepresented. Even though the retirees concede that the termination of the old plans was a non-fiduciary act, they nevertheless insist that a non-fiduciary act can constitute "part of the breach or violation" of fiduciary duty if it is the final act that gives rise to a cause of action.

In Adams v. Freedom Forge Corp., 204 F.3d 475 (3d Cir. 2000), this Court recently reviewed the elements of a breach of fiduciary duty claim like that of the plaintiffs here. We found the controlling precepts in our prior decision in this case:

> An employee may recover for a breach of fiduciary duty if he or she proves that an employer, acting as a fiduciary, made a material misrepresentation that would confuse a reasonable beneficiary about his or her benefits, and the beneficiary acted thereupon to his or her detriment.

Id. at 492, citing *Unisys II*, 57 F.3d at 1264.

Given these elements of a claim for breach of fiduciary duty in this context, it necessarily follows that any breach that may have occurred was completed, and a claim based thereon accrued, no later than the date upon which the employee relied to his detriment on the misrepresentations. Surely, any employee who sought counsel and who took early retirement based on Unisys' express assurance that she possessed guaranteed lifetime health care, thereby reducing the amount of pension she would otherwise receive, could bring suit immediately and secure rescission of her retirement or some other appropriate equitable relief.[7] Accordingly, it seems

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7. The dissenting opinion assumes that an employee misled by Unisys about guaranteed life care benefits would be entitled to a remedy taking into account his or her expectancy interest in such benefits rather than, or perhaps in addition to, the economic loss suffered when he changed position in detrimental reliance on Unisys' conduct. The District Court has not yet addressed what remedies may be available to a retiree who establishes a breach of fiduciary duty, and we, of course, express no opinion on the availability of expectancy compensation or any other form of relief. We do note, however, that there is a material difference between the value of a health care plan with guaranteed lifetime benefits and the value of a health care plan with benefits that can be canceled at any time for any reason. Accordingly, if an employee were entitled to an expectancy remedy as a result of retiring after being told he had the former, when in fact he had the latter, he would be entitled to bring suit immediately for the difference between the value he was promised and the value he received or for specific performance of the promise to provide a plan or policy with guaranteed lifetime health care. The dissent is correct, however, that a retiree who chose not to bring a suit for guaranteed lifetime benefits or the value thereof, and who died before any change in the plan, would serendipitously have wound up in the same position he would have been in had the misrepresentation been true. Accordingly, his estate would have no claim based on lost health care benefits.

clear to us that the six-year period for such plaintiffs commenced no later than the respective dates of their retirements.[8]

We therefore agree with the District Court that the denial of free health care coverage was not an element of the plaintiffs' claim. As the District Court pointed out, the alleged breach of fiduciary duty here concerned the counsel allegedly given or not given, and there is no causal nexus between that counsel and the denial of free health care coverage. *In re Unisys Corp.*, 957 F. Supp. at 639. If Unisys had provided clear and accurate counsel, some retirements may not have occurred when they did, but there is no reason to believe retirees would now have free coverage. As the District Court held, Unisys had a right to terminate free health care coverage, and it exercised that right in a non-fiduciary capacity. *Id.* at 638.[9]

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8. If the "date of the last action which constitutes a part of the breach" is the date of Unisys' last misrepresentation, it is theoretically possible that the statute could begin to run before a retiree could seek relief from a court since detrimental reliance is a necessary element of a breach of fiduciary duty of this kind. We need not decide, however, whether the six year period can begin to run before a breach of fiduciary duty claim accrues. As we have noted, the District Court and the parties have regarded the date of the last relevant misrepresentations and the date of detrimental reliance as being the same date and the only issue briefed is whether that date or the date of the denial of free health care coverage is the legally relevant date. Accordingly, we hold only that the statute began to run no later than the date of alleged detrimental reliance.

9. It is only fortuitous that the fiduciary who did the alleged counseling here was the employer who exercised its right to change

(Cont'd)

It is not clear to us, however, that the claims of all Sperry retirees who retired before November 17, 1986, and all Burroughs retirees who retired before December 3, 1986, are barred. While the primary theory of liability being asserted here is clearly that many relied on the misrepresentations to their detriment by deciding to take voluntary retirement, as we explain hereafter, Unisys has not persuaded us that this is the only viable theory of liability. It may well be that retirees who retired before those dates relied to their detriment in making other decisions after those dates. Accordingly, the summary judgment entered by the District Court was overbroad and must be reversed. Summary judgment for Unisys would be appropriate, however, with respect to those who assert claims based solely on retirement decisions made more than six years before suit was filed.

III.

Unisys argues that an essential element of the breach of fiduciary duty claim recognized in our prior opinion is a voluntary decision to retire made in reliance on a mistaken view that health care benefits were guaranteed for life. It necessarily follows, according to Unisys, that it is entitled to summary judgment with respect to anyone who was mandatorily retired at age 65, left the company's employ involuntarily because of disability, or for some other reason made no such decision.

(Cont'd)
the plans. If Unisys had not been the administrator of the plans and an independent administrator had breached its fiduciary duty by miscounseling retirees, it would be even more clear that the plan admendments were not "the last action which constituted a part of the breach."

In response, the plaintiffs insist that the category of claims we earlier recognized is not limited to claims based on retirement decisions and have submitted affidavits from members of the class who allege that, in reliance on their belief that they had guaranteed lifetime benefits, they declined other employment opportunities, chose to forego the opportunity to purchase supplemental health insurance, or made other important financial decisions for their retirement.

The District Court agreed with Unisys and granted summary judgment against all who would be unable to prove a voluntary decision to retire. We perceive no principled basis, however, for so cabining our holding in *Unisys II*. After all, in *Bixler*, upon which we heavily relied there, the decision resulting from the breach of fiduciary duty was a decision on whether to purchase COBRA insurance rather than a decision regarding retirement. *See Bixler*, 12 F.3d at 1301-03; *see also Curcio v. John Hancock Mut. Life Ins. Co.*, 33 F.3d 226, 237-39 (3d Cir. 1994) (fiduciary's misrepresentations about a new life insurance plan caused plaintiff to fail to obtain adequate coverage). It is, of course, not clear that the plaintiffs who rely upon these affidavits will be able to establish their entitlement to relief, but we decline Unisys' invitation to adopt an across the board prohibition of relief based upon reasonable reliance in contexts other than retirement decisions.

Understanding the import of our decision in Unisys II requires a recognition of the procedural posture in which that appeal arose. As we have noted, the District Court initially granted summary judgment to Unisys on the breach

of fiduciary duty claim. *See In re Unisys Corp.*, 837 F. Supp. at 679-80. It was only after the trial and our decision in *Bixler* that it decided to reinstate that claim. *See In re Unisys Corp.*, 1994 U.S. Dist. LEXIS 8549, 1994 WL 284079 at *25-27. It was the propriety of that decision to reinstate, and only the propriety of that decision, that was before us as a certified issue in that interlocutory appeal. We held that reinstatement was appropriate and remanded "for further proceedings."[10] *Unisys II*, 57 F.3d at 1269.

It is true, as Unisys stresses, that our opinion addressed the issue for decision in the context of the plaintiffs having

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10. At times, the plaintiffs appear to read our opinion as, in effect, directing the entry of summary judgment in their favor on at least the voluntary decision to retire claims. We do not so read the opinion, and the District Court did not so read it. At that point, Unisys had been provided with no opportunity to build a trial or summary judgment record in opposition to *Bixler* claims, and any ruling on the merits of those claims would have been inappropriate. On remand, the District Court noted that the breach of fiduciary duty claims had not been before it during the trial on the contract and estoppel claims and that, when reinstating those claims, it had made no determination that any plaintiff had proven his breach of fiduciary duty claim. On the contrary, the District Court on remand quoted the following observations it had made at the time of reinstatement:

> Because some plaintiffs have stronger cases than others based on their specific inquiries and the information given to them personally, the court finds that subclasses, and possibly even individual hearings, will be necessary to adjudicate these claims.

In re Unisys Corp., 957 F. Supp. at 645.

relied to their detriment in making decisions to retire. That was our focus because that was the plaintiffs' primary contention, and the absence of any reference to other kinds of reliance can hardly be taken as a ruling that other forms of reliance could not provide a valid basis for relief. We therefore reject the District Court's view that *Unisys II*, as a matter of law, limits recovery on the breach of fiduciary duty claims to claims based on voluntary decisions to retire. Moreover, we have found no other precedent supporting that position.

The District Court expressed two related concerns in the course of granting summary judgment to Unisys on the claims not based on voluntary retirement decisions: a concern about opening Unisys to unjustifiably broad relief and a concern about inconsistency with this Court's disposition of the estoppel claims. It expressed those concerns as follows:

> In allowing the breach of fiduciary claims to go forward, this court and the Court of Appeals for the Third Circuit have essentially held that reliance by the employees on the misrepresentations of Unisys, while not "reasonable reliance" for purposes of a claim of equitable estoppel, can still support a claim for breach of fiduciary duty. In a sense, the rulings in this case excuse the plan participants from their failure to read their summary plan documents in the limited context of making the retirement decision: because of the breach of duty, the employees may have retired earlier than they otherwise would have, and even if their reliance

> on the misrepresentations was not reasonable, the reliance supports a breach of fiduciary duty claim because it was at least partially the fault of Unisys.
>
> The "unreasonable" reliance excused here is narrow, and supports a breach of fiduciary duty claim only in certain limited circumstances — in this case, where the employees retired earlier than they might have had they not been misled by the lifetime misrepresentations. This court believes that expanding the concept of "resulting harm" in this case to the types of reliance alleged in the retirees' affidavits would create an unjustified expansion of the narrow holdings of this court, and would by indirection reinstate the claims for equitable estoppel.

In re Unisys Corp., 957 F. Supp. at 644.

The District Court's characterization of our decision in *Unisys II* as excusing "unreasonable reliance" is inappropriate. We did not there hold that the existence of the SPD was irrelevant to the analysis of the breach of fiduciary duty claims. An employer, even when acting in a fiduciary capacity, is not responsible for harm that is not reasonably foreseeable. As we pointed out in our prior opinion in this case and in *Adams*, in order for relief to be afforded, the conduct of the fiduciary must be such as to create a "substantial likelihood that it would mislead a reasonable employee in making [a decision to change his or her position]." *Unisys II*, 57 F.3d at 1264. Any determination of whether Unisys conveyed a message that was "materially

misleading" in this sense cannot simply ignore the existence of the SPD. Rather, what we held on this score in *Unisys II* was as follows: (1) that the SPD did not as a matter of law satisfy Unisys' fiduciary responsibility; and (2) that there was evidence from which a trier of fact could conclude that Unisys should have foreseen that its conduct with respect to at least some of the class would cause reasonable employees to rely to their detriment, despite the existence of the SPD. Whether that is the case depends, of course, on the content of the message conveyed and the context in which it was conveyed.

We did recognize in *Unisys II* that there are situations in which a fiduciary can reasonably foresee unreasonable reliance and, accordingly, be held accountable. *Bixler*, 12 F.3d 1292 (3d Cir. 1994), provides an example. Mrs. Bixler there acknowledged that she had received a notice from the fiduciary concerning a right to apply for COBRA health care insurance, but she mistakenly believed that she and her husband were not eligible to do so because he was already hospitalized. Shortly after Mr. Bixler's death but still well within the period when she could have elected to secure COBRA coverage, Mrs. Bixler called the fiduciary's representative to inquire about a death benefit. The fiduciary accurately informed her that there was no death benefit but failed to advise her that she could receive reimbursement for her husband's considerable hospital expenses by signing and returning the COBRA notice the fiduciary had sent to her husband. We concluded that there was evidence from which a trier of fact could infer that the fiduciary was aware of the Bixlers' circumstances and of Mrs. Bixler's mistaken belief about the unavailability of COBRA insurance. *See id.*

at 1302-03. In these circumstances, we held that the trier of fact could find a breach of fiduciary duty, and we did so without inquiring whether Mrs. Bixler's understanding of the COBRA notice was reasonable or unreasonable.

Our decision in *Bixler* is based on a fiduciary's duty to deal fairly with its beneficiary and, more specifically, "to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection." *Bixler*, 12 F.3d at 1300, quoting *Restatement (Second) of Trusts*, § 173, comment (d) (1959). As we noted in *Unisys II*, there is evidence here with respect to some employees from which a trier of fact could conclude that specific inquiries were made giving notice to Unisys representatives that the employees could be expected to make retirement decisions based on the mistaken belief that their health benefits were guaranteed for life. *See Unisys II*, 57 F.3d at 1266. Under *Bixler*, in these situations, a duty to advise of the reservation of rights clause would arise, and the existence of the SPD would not be relevant.

We also recognized in *Unisys II* that a duty to advise affirmatively of the reservation of rights clause might have arisen even in the absence of beneficiary-specific information concerning confusion or mistake. The evidence then of record, we suggested, could permit a finding that Unisys had acquired knowledge of confusion so pervasive that a reasonable fiduciary would have done more than simply rely on its SPD. *See id.* We did not, however, require clairvoyance on the part of the fiduciary. The law requires only that a fiduciary deal fairly with his beneficiaries and, in doing so,

that it "exercise such care and skill as a man of ordinary prudence would exercise" in his own affairs. *Restatement (Second) of Trusts*, § 174.

A judgment remains to be made as to whether a reasonable fiduciary in Unisys' position would have foreseen that its conduct towards the various plaintiffs would result in important decision making on their part based on a mistaken belief that they possessed guaranteed lifetime benefits. In situations involving actual knowledge on the part of Unisys that an employee was about to rely on such a misunderstanding, we agree with the District Court that the existence of the SPD is irrelevant. In other situations, however, the fact that Unisys had distributed what purported to be an authoritative guide to benefits is one of the circumstances that must be considered in passing this judgment on its conduct.

We do not believe holding Unisys to the kind of fair dealing standard we recognized in *Unisys II* will impose an unfair burden upon it even if it is held to that standard in the context of decisions other than voluntary retirement. We stress, however, that the character of the decision made and reliance claimed will, of course, play an important role in determining the extent of Unisys' fiduciary duty and whether that duty was breached. We also note that the District Court has not yet addressed what equitable remedies may be available to members of the class. Common law damages are not recoverable under ERISA for a breach of fiduciary duty, and this fact may also limit Unisys' exposure. *See Mertens v. Hewitt Assoc.*, 508 U.S. 248, 113 S. Ct. 2063, 124 L. Ed. 2d 161 (1993).

Appendix A

Our insistence on reasonable foreseeability as a prerequisite to legal responsibility on the breach of fiduciary duty claims is not inconsistent with our resolution of the plaintiffs' estoppel claims in *Unisys I*. As our earlier quotation above from our prior opinion demonstrates, those claims were predicated on an allegation that the plaintiffs had relied to their detriment on the text of the plan and SPD. *See* Slip at 25, *supra*. On that occasion, we summarized our holding as follows:

> Because our decisions require that any detrimental reliance on plan language also be "reasonable," our finding that the [reservation of rights clauses] are unambiguous undercuts the reasonableness of any detrimental reliance by the retirees. Accordingly, we hold that the district court did not err in concluding, on summary judgment, that the retirees' estoppel claim failed as a matter of law.

Unisys I, 58 F.3d at 908. The claim here, however, is not that the retirees relied on the text of the plans or the SPDs, but rather that they relied on counseling which they received from Unisys representatives.

IV.

The District Court's order dated March 10, 1997, will be reversed and this matter will be remanded to the District Court for further proceedings consistent with this opinion.

Appendix A

MANSMANN, *Circuit Judge*, concurring in part, and concurring in the result in part.

I am pleased to join with my colleagues in Part III of the majority opinion, which recognizes that an ERISA fiduciary who has created confusion about rights under a benefit plan has an ongoing responsibility for harm stemming from beneficiaries' decisions attributable to that confusion. While I also agree with the holding in Part II of the majority opinion that summary judgment must be reversed, I am unable to subscribe to the reasoning of that Part II because it threatens to undercut a fiduciary's responsibility by allowing a safe harbor so long as the breaching fiduciary arranges to keep the beneficiaries in the dark for six years after they rely on his misrepresentations. I believe that the majority's analysis of the statute of limitations affords too little protection for trusting workers by using an artificial notion of detriment to start the statutory period, by disregarding the fiduciary's ongoing obligation to correct known misunderstanding, and by effectively writing out of the statute the doctrine of tolling until discovery of a self-concealing wrong.[1]

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1. Part II of the majority opinion contemplates entry of summary judgment against retirees whose claims (i) are based solely on retirement decisions made more than six years before this action was filed, and (ii) were not concealed by Unisys's advice. It is not clear that any actual person's claim will meet these criteria, however. As the majority recognizes, retirees may rely on the presence of medical coverage in making many of life's decisions beyond the decision to retire. Most people probably take such vital background financial circumstances into consideration, at least tacitly, in everything that they do. Moreover, as explained below, I believe that all of these participants and beneficiaries detrimentally relied on Unisys's ongoing improper omission to correct its misrepresentations in declining to sue before they ultimately brought this action.

Appendix A

In light of the wide scope of Unisys's alleged concealment, and the potentially pervasive presence of acts of reliance beyond the retirement decision, my disagreement with Part II of the majority's analysis may be no more than theoretical, as it may well be that no claims at issue are "based solely on retirement decisions", and that all claims fall within the saving provisions of Part IIA or Part III.

I.

The applicable statute of limitations requires that claims be brought within six years of the "date of the last action which constituted a part of the breach or violation." 29 U.S.C. § 1113(1)(A). As the majority acknowledges, the "last action" necessary to make out the claims at issue is detrimental reliance. *See* Opinion at 15 (referring to material misrepresentation and detrimental reliance as elements) (quoting *Adams v. Freedom Forge Corp.*, 204 F.3d 475, 492 (3d Cir. 2000)). *See also Unisys II*, 57 F.3d at 1265 (defining elements of claim for fiduciary breach as (1) proof of fiduciary status, (2) misrepresentations, (3) company knowledge of confusion, and (4) resulting harm).[2]

The majority reasons, essentially, that the breach of duty by Unisys was its misrepresentation of the plan's provisions,

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2. We recently observed that construction of ERISA's six-year statute "implicates sophisticated questions about whether the statute begins to run at the date of the misrepresentations, the date of the plan amendment, or some other date". *Adams*, 204 F.3d at 494 n.19. As will appear, I believe it runs from the date of the detrimental amendment, while the majority believes it runs from "some other date" — viz., the date of the last act undertaken in reliance on the misrepresentations.

and the detriment or "resulting harm" to the participants was their retirement without the protection of a guarantee. *See* Opinion at 15-16. This effectively reads the element of harm or detriment out of the claim. Although the retirement decisions were made in reliance, such reliance did not become detrimental until Unisys announced termination of the promised post-retirement medical benefits. If the benefits had continued, there would have been no injury. *Cf. Texas v. United States*, 523 U.S. 296, 300, 140 L. Ed. 2d 406, 118 S. Ct. 1257 (1998) ("A claim is not ripe for adjudication if it rests upon 'contingent future events that may not occur as anticipated, or indeed may not occur at all.' ") (quoting *Thomas v. Union Carbide Agric. Prod. Co.*, 473 U.S. 568, 580-81, 87 L. Ed. 2d 409, 105 S. Ct. 3325 (1985)). Here, resulting harm was contingent on the company's future conduct.

The majority argues that actual harm is not a necessary element of a claim for breach of fiduciary duty. While that may be correct as a general proposition, it is incorrect as applied to the subset of fiduciary claims predicated on detrimental reliance. "Actual harm" and "detriment" appear to be synonymous. To the extent that there may be a difference between legal detriment and actual harm, only the latter should start the clock running for the statute of limitations. The significance of harm in the limitations context is that it brings the existence of the claim home to the claimant so that he may reasonably be expected to act. This purpose is not well served by a technical notion of "detriment" that does not actually impact the claimant.[3]

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3. Moreover, cases holding that it is not necessary to demonstrate harm to establish a breach of fiduciary duty do not stand

(Cont'd)

Appendix A

The majority illustrates its view of detriment by hypothesizing that an employee who "sought counsel" and took early retirement based on the company's assurance of lifetime health care could "surely" bring suit immediately and secure rescission of her retirement or other appropriate equitable relief.[4] Opinion at 15. However, the question of what actual or prospective harm is sufficient to allow suit

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(Cont'd)
for the proposition that harm, where present, is not part of the breach. *See Adams*, 204 F.3d 475, 492 (3d Cir. 2000). Fiduciary conduct is measured in light of all the attendant circumstances. There is a qualitative difference between an act by a fiduciary which falls short of the standard imposed by law and an act that also injures cestui que trust. Consequently, even a "non-fiduciary" act by the company which imposes injury on a beneficiary left vulnerable by a prior fiduciary breach becomes "part of the breach," and worsens it character. Thus, the "last action" could consist in the imposition of harm where it is part of the fiduciary breach, even if it were not a required element.

4. Although the question of remedy is not now before us, the majority's reference to rescission as an illustrative remedy is significant. As the majority recognizes in Part III, participants may rely on their misapprehension of the plan benefits in many ways beyond deciding to retire. Some of these acts of reliance — those involving expenditures or commitments made in expectation of a stronger financial position — would be difficult to rescind, and rescission would not make the participant whole. So in general the rescission remedy may be unwieldy and inadequate. This follows from the majority's unrealistic assumption that the decisions themselves constitute the detriment to be redressed; whereas, actually the harm to be remedied is the unexpected withdrawal of promised benefits.

by one apprized of her rights is not before us.[5] To my view, a more apt hypothetical concerns whether the estate of a participant who died before the old plan was terminated, and so received the promised medical benefits for life, would nevertheless be able to sue for breach of fiduciary duty because the promised benefits, though paid, had not been sufficiently assured by the written plan? Surely not. The claim would fail due to the absence of actual injury. Thus, while I am not prepared to say that a retiree may never bring suit prior to enactment of a threatened detrimental change, I do not believe that the statute of limitations requires her to bring a preemptive action to ward off potential harm that might never occur.

If instead of assuming that the object of a suit is to undo the retiree's life decisions, we recognize that the paradigmatic remedy may be enforcement of the promise on which the participants relied, then it becomes clear that the injury that triggers the suit results from the fiduciary's failure to comply with the promise, rather than from the employee's decision to retire. *Cf. Unisys II*, 57 F.3d at 1269 (indicating that "an injunction ordering specific performance of the assurances Unisys made" is an equitable remedy available under 29 U.S.C. § 1132(a)(3)).

Accordingly, I would hold that the "last action which constituted a part of the breach" for statute of limitation purposes was the termination of the medical benefits that Unisys had assured the retirees they would receive for life,

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5. That question concerns the requirement that we may only decide cases and controversies, and so turns on different policies from those underlying the statute of limitations.

rather than any particular decisions the retirees made on the strength of that assurance.[6]

II.

Even if our statute of limitations analysis were limited to fiduciary conduct by Unisys, the retirees' claims still should not be barred on the present record, as there is evidence that Unisys continued to breach its duty by failing to correct the mistaken beliefs that its prior misstatements created. Because this continuing breach involved an omission rather than an act, the six-year limitations period would not commence until "the latest date on which the fiduciary could have cured the breach or violation". 29 U.S.C. § 1113(1)(B).

As the majority observes, we have previously recognized that a fiduciary has a "duty to deal fairly with its beneficiary and, more specifically, 'to communicate to the beneficiary material facts affecting the interest of the beneficiary which he knows the beneficiary does not know and which the beneficiary needs to know for his protection.'" *Supra* at 21, quoting *Bixler v. Central Pa. Teamsters Health & Welfare Fund*, 12 F.3d 1292, 1300 (3d Cir. 1993).[7] Here, the evidence

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6. I disagree with the majority's statement that it is merely "fortuitous" that the fiduciary that misrepresented the permanency of the benefits is the same entity that ultimately cut off those benefits. To the contrary, it was the ability of Unisys to honor its promises that helped to induce the retirees' reliance and created a real prospect that they would not be injured.

7. Indeed, "the duty to disclose material information is the core (Cont'd)

suggests that Unisys breached this duty continuously from the time it first misrepresented the terms of the plan until the time the beneficiaries learned the material facts by receiving notice of the plan termination. Under the majority's holding, the beneficiaries' interests were not protected by the fiduciary's word, but could only be protected if they brought suit within six years. They therefore "needed to know for their protection" that the plan was not as it had been represented; and as the majority acknowledges in Part III of its opinion, there is evidence that Unisys knew that the employees were unaware of the material facts.

Unisys therefore had an ongoing duty to inform the participants of the true state of affairs. As long as Unisys had reason to believe that the retirees remained unaware of the material fact that the company retained a right to cut off their "lifetime" medical benefits, it was a violation of trust (i.e., a breach of fiduciary duty) every day for Unisys not to inform them.[8] *See* Adams, 204 F.3d at 493-94 ("Because

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of a fiduciary's responsibility." *Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 452 (3d Cir. 2000) (quoting *Glaziers & Glassworkers Union Local No. 252 Annuity Fund v. Newbridge Sec., Inc.*, 93 F.3d 1171, 1182 (3d Cir. 1996)).

8. As the majority recognizes, "a duty to advise affirmatively of the reservation of rights clause might have arisen even in the absence of beneficiary-specific information of confusion or mistake" where the fiduciary has "acquired knowledge of confusion so pervasive that a reasonable fiduciary would have done more than simply rely on its SPD." *Supra* at 22 (citing *Unisys II*, 57 F.3d at 1266). This duty is independent of the reasonableness of, or even the reasons for, the misapprehension.

Unisys was aware that it retained the right to modify, a knowing failure to clarify the material information about the retention of power was breach of its fiduciary duty.").

Had Unisys told plaintiffs the truth, they could have acted to protect themselves. *Cf. Harte v. Bethlehem Steel Corp.*, 214 F.3d 446, 448 (3d Cir. 2000) (holding that where beneficiaries might predictably and reasonably rely on a misinterpretation of a plan provision, "a fiduciary may be held liable for failing to inform a beneficiary" of his rights "in a timely manner . . . (so that he might attempt to protect himself)."). Consequently, the participants and beneficiaries should be permitted to prove that they relied to their detriment on Unisys's continuing non-disclosure, by refraining from bringing the present suit until after the omitted information was supplied.

Recognition of an ongoing duty to correct prior misstatements entails that the statute of limitations does not run while a misstatement remains uncorrected.[9] Conversely, the majority's holding that the statute runs from the date of retirement amounts to absolving the fiduciary from any ongoing duty to correct the misstatement. Today's holding is therefore contrary to our decisions in *Bixler* and *Harte*.

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9. It might be objected that recognition of an ongoing duty would result in an open-ended statute of limitations. However, I believe that it is entirely consistent with public policy and the federal common law embodied in the "fraud or concealment exception" to hold that a fiduciary who has misled his beneficiary may never seek refuge behind the statute of limitations as long as he allows the deception to continue unabated.

III.

The most troubling aspect of the majority opinion is its treatment of the self-concealing wrong issue. As the majority observes, in *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1552 (3d Cir. 1996) we "expressly reserved the issue, elsewhere debated, of 'whether § [1113]'s six year period extends to both "self-concealing" wrongs as well as "active concealment" separate from the underlying wrongdoing.' " *Supra* at 20. Although the majority does not expressly state whether its opinion is meant to address that issue, its requirement of "affirmative steps to conceal beyond the misrepresentations themselves" in order to toll the statute, *supra* at 11, amounts to an outright rejection of the self-concealing wrong doctrine. A requirement of additional conduct beyond the breach itself is fundamentally at odds with the concept that a wrong may be self-concealing.

I believe that the majority errs in interposing an additional requirement of an affirmative act of concealment on self-concealing wrongs. In so holding, it permits the ERISA statute of limitations to become an instrument to immunize fiduciary wrongdoing.

The "fraud or concealment" provision incorporates the long-established principle of federal common law that a statute of limitations is tolled until discovery of the wrong where there is either underlying fraud or separate acts to conceal wrongdoing.[10] As the Seventh Circuit has explained,

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10. The effect of the majority's requirement of additional acts of concealment even in cases of self-concealing fraud is to allow tolling only in cases of concealment, and so to write the fraud alternative out of the statutory exception.

> The reading we adopt . . . interprets the phrase "fraud or concealment" in a way that gives both terms meaning. An ERISA fiduciary can delay a wronged beneficiary's discovery of his claim either by misrepresenting the significance of facts the beneficiary is aware of (fraud) or by hiding facts so that the beneficiary never becomes aware of them (concealment).
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> . . . This interpretation of "fraud or concealment" harmonizes the phrase's meaning with the widely known doctrine of fraudulent concealment, which tolls the running of a statute of limitations when the defendant has prevented the plaintiff's timely discovery of the wrong she has suffered.

Radiology Ctr., S.C. v. Stifel, Nicolaus & Co., 919 F.2d 1216, 1220 (7th Cir. 1990). *See also Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1552 (3d Cir. 1996) (observing that § 1113 "does not protect defendants in instances involving concealment or fraud") (quoting *Gluck v. Unisys Corp.*, 960 F.2d 1168, 1177 (3d Cir. 1992)) (emphasis added).

The majority misinterprets our decision in *Kurz* as holding that even where concealing acts occur in the course of the underlying breach, "there must be conduct beyond the breach itself that has the effect of concealing the breach from its victims." *Supra* at 10. On the contrary, in *Kurz*, we expressly distinguished "self-concealing wrongs" from "'active concealment' separate from underlying wrong". 96 F.3d at 1552 n.5.[11]

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11. *See also Bailey v. Glover*, 88 U.S. 342, 349-50, 22 L. Ed.

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This case is not like *Kurz*. There was no occasion to address the effect of a self-concealing wrong there, because there was no concealment. Indeed, we observed in *Kurz* that the employer's announcement of the amendment at issue just 35 days after the alleged misrepresentation "exemplified the type of timely notification that companies should give their employees", and "foreclosed any suggestion that [the employer] attempted to conceal its plans or engaged in a campaign of fraud to prevent the plaintiff class from suing for the alleged breach". 96 F.3d at 1552. In the present case, in contrast, the company's conduct was far from exemplary, as it engaged in a "systematic campaign of confusion." *In re: Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 1994 U.S. Dist. LEXIS 8549, 1994 WL 284079 at 33 (E.D. Pa. June 24, 1994); *see also In re: Unisys Corp. Retiree Medical Benefits "ERISA" Litigation*, 1996 U.S. Dist. LEXIS 11781, 1996 WL 455968 at *4-6 (discussing sufficiency of evidence of systematic misrepresentation and confusion in reinstating claims of Burroughs and Unisys plaintiffs). As discussed above, one effect of the resultant

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636 (1874) (distinguishing between a fraud which "has been concealed" and one which "is of such character as to conceal itself"). Indeed, the majority opinion expressly acknowledges this distinction: "In this context, 'a self-concealing act is an act committed during the course of the original fraud that has the effect of concealing the fraud from its victims, while active concealment refers to acts intended to conceal the original fraud that are distinct from the original fraud.' *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996)." *Supra* at 10. Nevertheless, it proceeds to conflate the two concepts by requiring acts distinct from the original breach even where concealment occurs in the course of the underlying breach. *See supra* at 10-11.

confusion was to mislead beneficiaries into believing they had no need or cause to sue.[12] Consequently here, unlike in *Kurz*, it is necessary to consider the effect of such self-concealing misconduct on ERISA's statute of limitations.

The rationale underlying the self-concealing wrong doctrine has long been recognized in our law:

> To hold that . . . by committing a fraud in a manner that it concealed itself until such time as the party committing the fraud could plead the statute of limitations to protect it, is to make the law which was designed to prevent fraud the means by which it is made successful and secure.

Bailey v. Glover, 88 U.S. 342, 349, 22 L. Ed. 636 (1874). This principle that the law should not reward concealment is particularly applicable in the context of a fiduciary relationship. *See Amen v. Black*, 234 F.2d 12, 26 (10th Cir. 1956) ("The law does not require one to suspect his fiduciary. Surely no one would contend that the . . . statute of limitations was intended to impose upon the defrauded party

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12. *See Barker v. American Mobil Power Corp.*, 64 F.3d 1397, 1402 (9th Cir. 1995) (fraudulent concealment involves "affirmative conduct upon the part of the defendant which would, under the circumstances of the case, lead a reasonable person to believe that he did not have a claim for relief"). *Cf. Lettrich v. J.C. Penney Co., Inc.*, 213 F.3d 765 (3d Cir. 2000) (holding placement of amendment notice within technical document and failure to use more effective channels would support inference that employer intended to conceal amendment from affected employees).

the burden of discovering a fraud perpetrated by one standing in a position of trust.").[13]

If ever a case calls for application of the self-concealing wrong doctrine, this is such a case. Considering the facts in the light most favorable to the participants, as the party opposing summary judgment: Unisys purposely systematically misled its workers into believing that they had a legally protected right to medical benefits for life;[14] it perpetuated the misinformation by repeating its misstatements to many employees over a period of years;[15] and it avoided any action that would have brought the misrepresentation to the participants' attention, by paying the benefits until after the statutory period had passed.

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13. Congress enacted ERISA to "protect . . . the interests of participants in employee benefit plans . . . by establishing standards of conduct, responsibility and obligation for fiduciaries." 29 U.S.C. § 1001(b). ERISA should therefore be applied to avoid results that "would afford less protection to employees and their beneficiaries than they enjoyed before ERISA was enacted." *Heasley v. Belden & Blake Corp.*, 2 F.3d 1249, 1257 (3d Cir. 1993). Enabling fiduciaries to secure immunity for their self-concealing misrepresentations by lapse of time would violate this principle.

14. *See Unisys II*, 57 F.3d at 1266 (noting that the District Court "found that the company, both actively and affirmatively, systematically misinformed its employees about the duration of their benefits").

15. *See Unisys II*, 57 F.3d at 1265 ("Here the district court found that virtually the entire company management had consistently misrepresented the plan, not just on one occasion to one employee,

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Thus, Unisys's conduct may be distinguished from a garden-variety fiduciary breach by two important factors: first, the beneficiaries were deceived, and remained so, to Unisys's knowledge, for several years, until shortly before suit was filed; and second, the deception was procured by a systematic course of repeated misrepresentations calculated to prevent the entire class of aggrieved retirees from learning the truth. I believe this amounts to a self-concealing wrong, sufficient to toll the statute without regard to "additional" conduct — such as telling retirees that the reservation of rights in the SPD did not apply to them — which the majority properly finds sufficient to create a triable issue of concealment.[16]

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but over a period of many years and both orally (in group meetings) and in writing (in newsletters) as well."). I disagree with the majority's offhand remark that mere repetition of a misrepresentation cannot constitute concealment — especially in the present context, where the misrepresentation was repeated to all and sundry, creating pervasive misunderstanding. It seems clear that consistent repetition of a falsehood to all employees would well serve to prevent the truth from becoming known.

16. I agree with the majority's conclusion that the company's advice that the reservation of rights clause "pertained to active employees and not to retirees," *Supra* at 6, quoting *In re Unisys Corp.*, 1994 U.S. Dist. LEXIS 8549, 1994 WL 284079 at *34, amounts to an affirmative step to conceal the effect of the clause at issue, and thus to conceal the retirees' potential injury. *Cf. Adams*, 204 F.3d at 492 (finding participants likely to succeed on merits notwithstanding explicit reservation of rights where participants contended that, based on the employer's communications, they "reasonably believed that the active employees' booklets did not apply to them").

Appendix A

The majority gives great weight to Unisys's distribution of a Summary Plan Description with a reservation of rights clause. Any implication that there can be no concealment where an accurate SPD is provided is inconsistent with our cases holding that participants can be misled despite an accurate SPD, and that a fiduciary should not be permitted to prey upon the participants' foreseeable confusion.[17] Moreover, it is inconsistent with the majority's own recognition of evidence that, "despite the existence of the SPD", employees had "the mistaken belief that their health benefits were guaranteed for life." *Supra* at 21.[18]

In sum, this case involves systematic conduct by Unisys that foreseeably led participants and beneficiaries to believe

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17. *See, e.g., Adams*, 204 F.3d at 492-93 ("[A] company cannot insulate itself from liability by including unequivocal statements retaining the right to terminate the plans at any time in the SPDs. . . . Conflicting assertions cannot be ignored because they are not in the formal ERISA document."); *Harte*, 214 F.3d at 451 n.6 ("The fiduciary duty to disclose and explain is not achieved solely by technical compliance with the statutory notice requirements."); *Unisys II*, 57 F.3d at 1264 ("Satisfaction . . . of . . . disclosure obligations [through an SPD] . . . does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty . . . to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those [to] whom the duties of loyalty and prudence are owed.").

18. The majority holds that the SPD is but "one of the circumstances that must be considered" on the question of fiduciary breach. *Supra* at 22. The same must hold true for the role of the SPD on the question of concealment.

that they did not have a claim.[19] That the concealing acts were woven into the fabric of Unisys's initial wrongdoing should be of no moment. Accordingly, I concur with the majority's holding that the plaintiffs have established at least a triable issue as to whether this is a case of "fraud or concealment", so that the statute of limitations would only begin to run upon discovery of the breach.

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19. As the majority concludes in Part III of its opinion, "there was evidence from which a trier of fact could conclude that Unisys should have foreseen that its conduct . . . would cause reasonable employees to rely to their detriment, despite the existence of the SPD." *Supra* at 20. By the same token, a factfinder could conclude that Unisys's conduct would cause those employees "to believe that [they] did not have a claim for relief" — which is the essential characteristic of concealment. *Barker*, 64 F.3d at 1402.

APPENDIX B — MEMORANDUM AND ORDER OF THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA DATED, FILED AND ENTERED MARCH 10, 1997

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL NO. 969

IN RE UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

MEMORANDUM

Cahn, C.J. March 10, 1997

Plaintiff retirees brought this class action against their former employer, Unisys Corporation,[1] pursuant to the Employee Retirement Income Security Act of 1974, 29 U.S.C. § 1001 *et seq.* ("ERISA"). Before the court are a motion for summary judgment by the Sperry retirees and two motions for partial summary judgment by Unisys. For the reasons stated below, Plaintiffs' motion is denied, and Defendant's motions are granted in part and deferred in part.

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1. Unisys Corporation is the product of a 1986 merger between the Sperry and Burroughs Corporations. The class of plaintiffs includes former employees of all three corporations. Unless otherwise stated, this opinion will use the term "Unisys" to refer to all three companies.

Appendix B

I. FACTS AND PROCEDURAL HISTORY[2]

This class action, filed on behalf of former employees of the Sperry, Burroughs, and Unisys Corporations, arises out of Unisys' termination of its post-retirement medical plans for retirees and disabled former employees of the three companies.

On November 3, 1992, Unisys announced that effective January 1, 1993, it was terminating all pre-existing medical benefit plans ("old plans") and replacing the old plans with a new one, called the Unisys Post-Retirement and Extended Medical Disability Plan ("new plan"). Under the majority of the old plans, Unisys had paid the entire medical premium for a retiree's life and provided continuing benefits for the retiree's spouse. In contrast, the new plan would require retirees to contribute an increasing portion of the premiums until January 1, 1995, at which time the retirees would become responsible for the entire premium. Plaintiffs, who will be referred to throughout this opinion as the retirees, brought suit in several jurisdictions to challenge the termination of benefits. The Judicial Panel on Multidistrict Litigation transferred the cases to the Eastern District of Pennsylvania. This court certified the class and identified several subclasses.[3]

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2. The factual and procedural history in this case is extensive, and the court will not repeat it in detail here. For a summary of the factual background in this action, *see In Re Unisys Corp. Retiree Medical Benefits ERISA Litig.*, 837 F. Supp. 670, 672 (E.D. Pa. 1993), *aff'd*, 61 F.3d 896 (3d Cir. 1995).

3. The sub-class of Sperry retirees includes "[a]ll non-union retired, disabled and other eligible former employees and their (Cont'd)

Appendix B

The claims raised by the retirees sought relief based on three causes of action: breach of contract, equitable estoppel, and breach of fiduciary duty. On the breach of contract claims, which sought reinstatement of the old plans based on the theory that the benefits had vested and that the company had an obligation to continue the plans, the court

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spouses and dependents who as of November 3, 1992 were participants in or beneficiaries of the employee welfare benefit plans pursuant to which Unisys or its predecessor, Sperry Corporation, has provided medical benefits to former employees of Sperry Corporation (or any division or unit thereof) who retired, became disabled or otherwise became eligible on or before April 1, 1989." *In re Unisys*, 837 F. Supp. at 677 n.10.

The sub-class of Burroughs retirees includes "[a]ll non-union retired, disabled and other eligible former employees and their spouses and dependents who as of November 3, 1992 were participants in or beneficiaries of the employee welfare benefit plans pursuant to which Unisys or its predecessor, Burroughs Corporation, has provided medical benefits to former employees of Burroughs Corporation (or any division or unit thereof) who retired, became disabled or otherwise became eligible on or before May 1, 1989." *Id.* at 676 n.9.

The sub-class of Unisys retirees includes "[a]ll non-union retired, disabled and other eligible former employees and their spouses and dependents who as of November 3, 1992 were participants in or beneficiaries of the employee welfare benefit plans pursuant to which Unisys has provided medical benefits to former employees of Unisys who retired, became disabled or otherwise became eligible on or after April 2, 1989, in the case of former Sperry employees, and May 2, 1989, in the case of former Burroughs employees." *Id.* at 675 n.8.

granted Unisys' summary judgment motion as to the Burroughs and Unisys retirees, but denied the motion on the Sperry retirees' claims. *In re Unisys,* 837 F. Supp. at 675-79. Following a non-jury trial, this court entered judgment for Unisys on the Sperry retirees' contract claims. *In re Unisys Corp. Retiree Medical Benefits ERISA Litig.,* MDL No. 969, 1994 WL 284079, at *18-25 (E.D. Pa. June 23, 1994), *aff'd,* 58 F.3d 896, 901-06 (3d Cir. 1995). On the equitable estoppel claims, this court granted Unisys' motion for summary judgment against all classes, 837 F. Supp. at 680-81, and this court's refusal to reinstate these claims was affirmed. 58 F.3d at 907-08.

On the breach of fiduciary duty claims, the court originally granted Unisys' motion for summary judgment. However, after trial of the Sperry retirees' contract claims, the court granted the Sperry retirees' motion to reinstate their fiduciary duty claims. *In re Unisys,* 1994 WL 284079, at *25-27. The Burroughs and Unisys retirees then moved to reinstate their breach of fiduciary duty claims. The court stayed all further proceedings on all three classes' breach of fiduciary duty claims pending the resolution of an interlocutory appeal of the Sperry reinstatement decision. The Third Circuit Court of Appeals affirmed the decision to reinstate the Sperry retirees' fiduciary claims, and the petition for writ of *certiorari* to the United States Supreme Court was denied. *In re Unisys Corp. Retiree Medical Benefits "ERISA" Litig.,* 57 F.3d 1255 (3d Cir. 1995), *cert. denied,* 116 S. Ct. 1316 (1996). This court then considered supplemental memoranda filed by the parties, and granted the Burroughs and Unisys retirees' motions for reinstatement of their breach of fiduciary duty claims. *In re Unisys Corp.*

Appendix B

Retiree Medical Benefits ERISA Litig., MDL 969, 1996 WL 455968 (E.D. Pa. Aug. 13, 1996).

In reinstating the Burroughs and Unisys retirees' breach of fiduciary duty claims, the court invited Unisys to file dispositive motions based on the statute of limitations and the relief available for any successful plaintiffs. *Id.* at *6. Unisys has done so in the form of the two motions for partial summary judgment now before the court. Also before the court is a motion by the Sperry retirees for summary judgment on their breach of fiduciary duty claims. This opinion addresses all three motions.

II. STANDARD FOR SUMMARY JUDGMENT

Summary judgment is appropriate when the record shows that "there is no genuine issue as to any material fact and that the moving party is entitled to judgment as a matter of law." Fed.R.Civ.P. 56(c). The court's role is to determine whether the evidence is such that a reasonable jury could return a verdict for the non-moving party, with all reasonable inferences viewed in the light most favorable to the non-moving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 249, 255 (1986). The moving party has the burden of demonstrating that no genuine issue of material fact exists, but if the non-moving party fails to produce sufficient evidence in connection with an essential element of a claim for which it has the burden of proof, then the moving party is entitled to summary judgment. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322-23 (1986).

Appendix B

III. THE BREACH OF FIDUCIARY DUTY CLAIMS

The breach of fiduciary duty claims allege a violation of ERISA § 404(a):

> [A] fiduciary shall discharge his duties with respect to a plan solely in the interest of the participants and beneficiaries and for the exclusive purpose of: (i) providing benefits to participants and their beneficiaries; and (ii) defraying reasonable expenses of administering the plan.

29 U.S.C. § 1104(a)(1)(A). ERISA § 502(a)(3)(B) provides the retirees with a cause of action:

> A civil action may be brought by a participant, beneficiary, or fiduciary to obtain other equitable relief (i) to redress such violations or (ii) to enforce any provisions of this subchapter or the terms of the plan.

29 U.S.C. § 1132(a)(3)(B).[4]

In this action, the Third Circuit Court of Appeals has detailed the four elements the retirees must demonstrate in

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4. In *Bixler v. Central Pa. Teamsters Health and Welfare Fund*, 12 F.3d 1292 (3d Cir. 1993), the Third Circuit Court of Appeals held that direct actions for breach of fiduciary duty are available to individual plan participants under § 1132(a)(3)(B). The Supreme Court has since agreed with this conclusion. *Varity Corp. v. Howe*, 116 S.Ct. 1065, 1075-1079 (1996).

order to succeed on their breach of fiduciary duty claim: proof of fiduciary status, misrepresentations by the company, company knowledge of the confusion created, and resulting harm to the employees. *In re Unisys,* 57 F.3d at 1265. These elements will be discussed in more detail in section VII of this opinion.[5]

In addressing the arguments made regarding the retirees' breach of fiduciary duty claims, it is important to note that this court has already ruled that Unisys had a contractual right, under ERISA, both to use the reservation of rights language in the summary plan description ("SPD") and to terminate the old plans. The breach of fiduciary duty claims survive because Unisys had fiduciary responsibilities independent of its contractual responsibilities under the plan. *In re Unisys,* 57 F.3d at 1265. In affirming this court's reinstatement of the breach of fiduciary duty claims, the Court of Appeals for the Third Circuit explained:

> [S]atisfaction by an employer as plan administrator of its statutory disclosure

5. At this point, however, the court will take a moment to clear up a point of confusion about the number of elements in the Sperry retirees' claims. Unisys reads *In re Unisys,* 57 F.3d at 1265-66, to require three additional elements beyond the four listed above: evidence on the materiality of the misrepresentations, Unisys' awareness of their materiality, and the employees' reliance on the misrepresentations. This court agrees with the retirees that the Third Circuit's discussion of these issues did not set forth additional elements for the retirees to prove. Rather, the court outlined the evidence supporting the four elements, and explained that the evidence of materiality and reliance sufficed to support the elements of the breach of fiduciary duty cause of action.

> obligations under ERISA does not foreclose the possibility that the plan administrator may nonetheless breach its fiduciary duty owed plan participants to communicate candidly, if the plan administrator simultaneously or subsequently makes material misrepresentations to those whom the duty of loyalty and prudence are owed.

Id. at 1264.[6] The breach of fiduciary duty claims are based not on the termination of the old plans, since the court has already held that the termination of the plans was not a breach of the company's fiduciary duty. *In re Unisys,* 837 F. Supp. at 679. Rather, they rely on the misrepresentations about the lifetime benefits in the old plans. The court reinstated the claims because the retirees presented significant evidence that Unisys made repeated and pervasive representations that the medical benefits were "for life," without ever mentioning the reservation of rights clause, which allowed Unisys to terminate the plans at any time. The court will elaborate on the substance of the fiduciary claims as necessary throughout this opinion; however, the court will first address Unisys' motion for partial summary judgment based on the applicable statute of limitations.

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6. The recent decision by the court of appeals in *Ream v. Frey,* 1997 WL 61425, __ F.3d __ (3d Cir. Feb. 14, 1997) reaffirms this proposition. In that case, the court ruled that "it would be overly formalistic (and contrary to the explicit statutory directives in ERISA)" to hold a fiduciary's compliance with the terms of a plan necessitates a finding that the fiduciary satisfied its fiduciary duties. *Id.* at *8.

Appendix B

IV. STATUTE OF LIMITATIONS

ERISA contains an express statute of limitations for breach of fiduciary duty claims. Section 413 of ERISA provides:

> No action may be commenced under this subchapter with respect to a fiduciary's breach of any responsibility, duty, or obligation . . . after the earlier of —
>
> > (1) six years after (A) the date of the last action which constituted a part of the breach or violation, or (B) in the case of an omission, the latest date on which the fiduciary could have cured the breach or violation, or
> >
> > (2) three years after the earliest date on which the plaintiff had actual knowledge of the breach or violation;
>
> except that in the case of fraud or concealment, such action may be commenced not later than six years after the date of discovery of such breach or violation.

29 U.S.C. § 1113. This section creates a general limitations period of six years from the breach of duty, shortened to three years in cases where the plaintiffs have actual knowledge, and extended to six years from the date of discovery in cases where the fiduciary used fraud or

concealment. *Kurz v. Philadelphia Elec. Co.*, 96 F.3d 1544, 1551 (3d Cir. 1996). Unisys seeks to have this court grant summary judgment against all the Sperry retirees who retired before November 17, 1986 (six years before the first complaint by the Sperry retirees was filed), and against all the Burroughs retirees who retired before December 3, 1986 (six years before the first complaint by the Burroughs retirees was filed).

The court must resolve several issues regarding the application of the statute of limitations. The first is whether Unisys used fraud or concealment to hide its breach of fiduciary duty from the plaintiffs. If the court finds that there is a genuine factual dispute regarding whether Unisys used fraud or concealment to conceal a breach of fiduciary duty, Unisys' summary judgment motion must be denied, because the retirees filed suit within six years of the actual discovery of the breach.[7] If the court does not find fraud or concealment, I must next determine whether the case involves an action or an omission as defined in the statute. The third question is the date of the last action constituting a part of the breach or violation, or the latest date on which Unisys could have cured the breach or violation. Finally, the court must determine whether the statute of limitations should be equitably tolled given the circumstances of this case.

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7. Unisys contends that some of the retirees' claims will be time-barred through the operation of the three-year statute of limitations which begins when a plaintiff has "actual knowledge" of the actions constituting the breach of fiduciary duty. Unisys does not contend that it has presented evidence allowing this court to make a class-wide finding of actual knowledge. Therefore, the court need not determine whether any of the plaintiffs are barred by the three-year statute of limitations.

Appendix B

A. Did Unisys use fraud and concealment?

The retirees contend that the proper statute of limitations for the court to apply is the final clause of § 1113, which states that a showing of fraud and concealment tolls the statute of limitations, giving the plaintiffs six years from the date of discovery of the breach in which to sue. This court finds no genuine factual dispute about the allegations of fraud, and holds that the "fraud or concealment" tolling provision does not apply in this case. The court has already held that there are "no substantiated allegations of fraud or bad faith on Unisys' part." *In re Unisys*, 837 F. Supp. at 680-81 (footnote omitted), and finds no reason to disturb that holding here.[8]

The Third Circuit Court of Appeals recently interpreted the "fraud or concealment" provision of § 1113, and held that the federal common law discovery rule now applies to ERISA breach of fiduciary duty claims. *Kurz*, 96 F.3d at 1552. "In other words, when a lawsuit has been delayed because the defendant itself has taken steps to hide its breach of fiduciary duty, the limitations period will run six years after the date of the claim's discovery." *Id.* (internal citation omitted). The *Kurz* opinion emphasized that "[t]he relevant question is . . . not whether the complaint 'sounds in

8. Unisys asserts that the retirees' assertions of fraud and concealment were not pleaded with specificity as required by Federal Rule of Civil Procedure 9(b). Unisys Reply Mem. Supporting Partial Summ. Judg. on Claims of Sperry Retirees at 11 n.4. The court has chosen to deal with the merits of the fraud allegation, but notes that lack of specificity as to the fraud allegations supports its decision on the merits.

concealment,' but rather whether there is evidence that the defendant took *affirmative steps* to hide its breach of fiduciary duty." *Id.* (emphasis added).

There are two types of fraudulent "affirmative steps" that can toll § 1113. "Active concealment" refers to acts *distinct* from the original fraud that are intended to conceal the original fraud. *Wolin v. Smith Barney, Inc.*, 83 F.3d 847, 852 (7th Cir. 1996). "Self-concealing" fraud refers to acts committed during the course of the original fraud that have the effect of concealing the fraud from its victims. *Id.* There has been no evidence that active concealment was involved in this case. The allegations of concealment for the purposes of tolling the statute of limitations are not independent of or distinct from the original misrepresentations that are the basis of the breach of fiduciary duty claim. Indeed, the gravamen of both the breach claim and the claim of fraud is that Unisys "concealed the true nature of the plans by knowingly and systematically misrepresenting the duration of [the lifetime] benefits." Mem. of Sperry Pltfs. in Opposition to Def.'s Mot. for Partial Summ. Judg., 13. Therefore, this court will address the claims of fraud and concealment only as allegations of self-concealing wrongs.

It should be noted that not all courts have accepted that self-concealing wrongs, as opposed to active and distinct concealment, can toll the statute of limitations under the fraud or concealment exception.[9] However, this court need not

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9. The *Kurz* opinion explicitly left the question undecided. 96 F.3d at 1552 n.5. There is disagreement among the courts that have addressed the issue. *Compare J. Geils Band Employee Benefit*

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decide the question at this time, because even if the exception applies in cases of self-concealing wrongs, Unisys' actions do not reach the level of fraud or fraudulent concealment.

Regardless of whether the fraud alleged by a plaintiff involves active and independent concealment or a self-concealing breach of fiduciary duty, in order to find fraud or concealment under § 1113, "there must be actual concealment — i.e., some trick or contrivance intended to exclude suspicion and prevent inquiry." *Larson v. Northrop Corp.*, 21 F.3d 1164, 1173 (D.C. Cir. 1994) (internal citations omitted). In this case, there has been no such trick or contrivance. The reservation of rights clause, published in the summary plan description ("SPD") which all participants received, explained the nature of the lifetime benefits. While this court and the court of appeals have concluded that compliance with SPD disclosure obligations does not relieve a company of its fiduciary duty to avoid confusing participants about their benefits, this court will not hold that the truth about the "lifetime" benefits was concealed from

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Plan v. Smith Barney Shearson, Inc., 76 F.3d 1245, 1253 n.9 (1st Cir.), *cert. denied*, 117 S.Ct. 81 (1996) (leaving the question open but implying it is likely to hold the exception will apply to self-concealing wrongs) *and Diduck v. Kaszycki & Sons Contractors, Inc.*, 874 F.2d 912, 919-20 (2d Cir. 1989) (exception applies if fraud and concealment involved in the underlying breach), *with Radiology Center, S.C. v. Stifel, Nicolaus & Co.*, 919 F.2d 1216, 1220 (7th Cir. 1990) (concluding the exception refers only to active concealment to hide the breach, not to "the underlying nature of plaintiffs' claim"); *and Schaefer v. Arkansas Medical Soc.*, 853 F.2d 1487, 1491-92 (8th Cir. 1988) (only discussing active concealment in determining whether to apply fraud or concealment exception).

participants when the information about the reservation of rights clause was unambiguously printed and distributed in the SPD.

The retirees ask the court to deny partial summary judgment, urging that there is at least a factual dispute regarding the allegations of fraud. To demonstrate the existence of such a dispute, the retirees have the burden of supplying this court with "sufficient evidence, not mere allegations" supporting their position, so that retirees could reasonably win on their position at trial. *Coolspring Stone Supply, Inc. v. American States Life Ins. Co.*, 10 F.3d 144, 148 (3d Cir. 1993). In support of their allegations of a "trick or contrivance intended to exclude suspicion and prevent inquiry," plaintiffs have pointed to a letter from the mid-1980s from a consulting company which discusses the liabilities created by the old plans and the "implied promise" made regarding the benefits, and a set of correspondence between H.P. Seward and W.H. Beadle in 1970. Appendix to Unisys Motion, Exh. 8-9. These letters and other evidence of a similar vein (*see* Sperry Pltfs' Statement of Undisputed Facts, attached to Sperry Pltfs' Mot. for Summ. Judg., ¶¶ 66-82) may help the retirees establish a breach of fiduciary duty by showing that Unisys was aware of the materiality of the "lifetime" promise to the employees in making their retirement decisions. However, they reveal no trick, contrivance, or intent to deceive the plaintiffs about the existence of the published reservation of rights clause.

Other courts have refused to apply the fraud or concealment exception to § 1113 when the information a plan participant alleges has been concealed is actually readily

available to that person, and this court agrees with that conclusion. *See J. Geils Band Employee Benefit Plan v. Smith Barney Shearson, Inc.*, 76 F.3d 1245, 1255-60 (1st Cir.), *cert. denied*, 117 S.Ct. 81 (1996) (no fraud or concealment under § 1113 where alleged oral misrepresentations giving rise to breach of fiduciary duty claim were belied by information in written documents available to plaintiffs); *Wolin*, 83 F.3d at 854 (oral representations contradicting clear written statements cannot constitute fraudulent concealment under § 1113). It would be odd indeed to characterize the facts of this case as constituting fraud or concealment when the reservation of rights clause was included in the SPD, the very instrument designed by Congress for communicating the essential terms of a plan to participants. *See Curtiss-Wright Corp. v. Schoonejongen*, 115 S.Ct. 1223, 1230 (1995) (ERISA has an "elaborate scheme . . . built around reliance on the face of written plan documents" to enable beneficiaries to learn their rights).

The reluctance of this and other courts to apply the fraud or concealment exception in cases where the SPD or other available documentation unambiguously reveals the true situation is consistent with the federal common law discovery rule. The discovery rule, as applied to this portion of § 1113, includes a requirement of "reasonable diligence" on the part of the plaintiffs. As the Court of Appeals for the Third Circuit has explained, "[t]he statute of limitations is tolled until the plaintiff in the exercise of *reasonable diligence discovered or should have discovered* the alleged fraud or concealment." *Kurz*, 96 F.3d at 1552 (emphasis added) (citations omitted); *see also Larson*, 21 F.3d at 1172 (application of fraud exception to § 1113 requires plaintiffs show that they "were

not on actual or constructive notice of [the evidence of breach], despite . . . their exercise of reasonable diligence.") (citations omitted). In this case, reasonable diligence on the part of the plaintiffs would have led to a discovery of the reservation of rights clause. While there was a breach of duty by Unisys in its misrepresentations about the lifetime guarantee, there is no genuine issue of material fact as to whether the misrepresentations reach the level of a trick or contrivance designed to prevent plan participants from learning the truth.

Unisys' 1992 decision to replace all pre-existing plans with the Unisys Post-Retirement and Extended Disability Plan ("the new plan") was the product of a number of factors. It was prompted in part by the issuance of Financial Accounting Standards Board Statement No. 106 ("FAS 106"), which would have created large liabilities on Unisys' financial statements. *In re Unisys*, 1994 WL 284079, at *3.[10] Unisys also terminated the old plans because of escalating medical costs and administrative costs of maintaining many different plans. There is no evidence that Unisys terminated the prior plans in furtherance of an intent to defraud the plaintiffs. The court of appeals has "accept[ed] Unisys' contention that at the time lifetime benefits were promised, no one at Sperry ever intended or anticipated that there would one day be the need to reduce or eliminate retiree medical

10. In an effort to make financial statements more accurately reflect the true liabilities of companies, FAS 106 required employers, beginning in fiscal year 1992, to "accrue an expense against current income for the expected future cost of post-retirement benefits and to recognize on its balance sheet a liability for unfunded benefit costs." *In re Unisys*, 1994 WL 284079, at *34 n.7 (citations omitted).

benefits." *In re Unisys*, 57 F.3d at 1265 n.15. While the retirees have shown misrepresentations by the company, they have not substantiated their allegations of fraud.[11] Therefore, this court will not apply the "fraud or concealment" tolling provision of the statute of limitations, and will look to § 1113(1) to decide the statute of limitations issue.

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11. Misrepresentations are generally considered fraudulent only if scienter is present. *See*, Restatement of Torts 2d § 526 (1976). Scienter "refers to a mental state embracing intent to deceive, manipulate, or defraud." *Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 194-95 n.12 (1976). In some contexts, recklessness meets the standard for scienter. *See, e.g., In re Phillips Petroleum Securities Litig.*, 881 F.2d 1236, 1244 (3d Cir. 1989) (interpreting § 10(b) of the Securities Exchange Act). At oral argument, the retirees asked the court to find that Unisys' misrepresentations meet, if not the level of intentional deception, then at least the level of recklessness.

Because this issue was raised for the first time at oral argument and the parties have not briefed it, the court will not determine whether reckless misrepresentations can satisfy fraud's scienter requirement in the context of an ERISA breach of fiduciary duty. Regardless of the answer to this question, the court has no factual basis on which to find the company's misrepresentations reckless. The retirees have presented no evidence that at the time the misrepresentations were made, anyone at Unisys either knew there was no basis for the representations or ignored an obvious danger of misleading the retirees. *Cf.* Restatement of Torts 2d § 526(b-c) (recklessness means making statements with either no confidence in their accuracy or with knowledge that there is no basis for them); *In re Phillips Petroleum*, 881 F.2d at 1244 (fraudulent misrepresentation encompasses "an extreme departure from the standards of ordinary care, . . . which presents a danger of misleading . . . that is either known . . . or is so obvious that the actor must have been aware of it.") (citations omitted).

B. Is the alleged breach an act or an omission?

Having concluded that subsection (1) of § 1113 applies to this case, the court must determine whether to apply § 1113(1)(A), which measures six years from the date of an act allegedly constituting a breach of fiduciary duty, or § 1113(1)(B), which measures six years from the last date on which the omission allegedly constituting a breach of fiduciary duty could have been cured. Because the court finds that the claims in this case are based on affirmative acts, the former measure is appropriate.

Unisys argues that this case is properly considered one of an omission because the breach of fiduciary claims were reinstated based on the Third Circuit's holding in *Bixler*. In *Bixler*, the court of appeals held that ERISA fiduciaries have an "affirmative duty to inform" when the fiduciary knows its silence might be harmful. 12 F.3d at 1300. Unisys argues that because the failure to allay the employees' confusion supports the fiduciary duty claim, the case is rightfully considered one of omission.

The court disagrees, and holds that this case is more accurately described as a case of affirmative acts rather than omissions. The breach of fiduciary duty claims by the retirees were reinstated based upon "a strong current in the Third Circuit that recognizes that an ERISA fiduciary may not 'affirmatively mislead' plan participants." *In re Unisys*, 1994 WL 284079 at *25 (citations omitted) (Sperry regular retirees); *see also In re Unisys*, 1996 WL 455968 at *6 (Burroughs and Unisys regular retirees). When the Third Circuit Court of Appeals affirmed the reinstatement of the

breach of fiduciary duty claims, it specifically rejected Unisys's description of the case as involving a "duty to remind," finding instead that the dispute was "more accurately characterized as a dispute over an employer's duty, as an ERISA fiduciary, not to misinform employees through material misrepresentations and incomplete, inconsistent or contradictory disclosures." *In re Unisys*, 57 F.3d at 1264.

This court found widespread affirmative misrepresentations in the case of the Sperry retirees:

> This is not a case where one or two low-level benefits counselors told a few retirees that their benefits would continue for life. The message that medical benefits would last for life was confirmed repeatedly and systematically throughout the Sperry organization, by all levels of management, in writing and verbally.

In re Unisys, 1994 WL 284079, at *25. In the case of the Burroughs and Unisys retirees, the court reinstated the fiduciary duty claims because Plaintiffs produced evidence that Unisys made affirmative and material misrepresentations to them as well. *In re Unisys*, 1996 WL 455968, at *6. This court's opinions focus primarily on affirmative acts of misrepresentation, and the court of appeals has included "misrepresentations" as a necessary element of each retiree's case. *In re Unisys*, 57 F.3d at 1265. The misrepresentations made in this case are more than omissions; they constitute affirmative conduct.

In truth, the breach alleged in this case involves both omissions and acts. Significant for this court's reinstatement

of the fiduciary claims were *both*: "(1) the evidence of corporate management's awareness of confusion or at least the potential for confusion regarding the permanency of health benefits after retirement; and (2) corporate management's exacerbation of this confusion through informal communications which failed to clarify the limits of the coverage." *In re Unisys*, 1996 WL 455968, at *2. The first phrase implies an omission, the second an affirmative act. The court of appeals highlighted the dual nature of the breach alleged:

> Our decisions in *Bixler, Fischer, Curcio* and *Smith* firmly establish that when a plan administrator affirmatively misrepresents the terms of a plan *or* fails to provide information when it knows that its failure to do so might cause harm, the plan administrator has breached its fiduciary duty to individual plan participants and beneficiaries.

In re Unisys, 57 F.3d at 1264 (emphasis added). However, the court finds that the emphasis of the discussion has been on Unisys' wrongful actions rather than its omissions. This court and the court of appeals have allowed this breach of fiduciary duty action to proceed largely because Unisys "actively and affirmatively, systematically misinformed its employees." *Id.* at 1266. Therefore, the court will apply the statute of limitations in § 1113(1)(A) and look to the date of the last act constituting part of the breach.

C. What is the date of the last act constituting part of the breach?

Plaintiffs contend that the date of the last action constituting part of the alleged breach occurred in 1992, when

Unisys acted contrary to its misrepresentations and terminated the old benefit plans. According to Plaintiffs, the resulting harm in this case did not take place until the old plans were terminated, so the cause of action did not accrue until then. In response to Unisys' argument that the last date constituting part of the breach was the date each plaintiff retired, the retirees point out that the date of the last "action constituting part of the breach or violation" refers to an action taken by the party committing the breach, not to actions taken by the victims of the breach.

The court disagrees with the retirees, and holds that the last action constituting part of the breach of fiduciary duty took place on the date that each plaintiff retired. This decision does not imply that the act of retirement is part of the breach. Rather, I am holding that Unisys' last action constituting part of the breach of fiduciary duty owed to any individual employee was complete on the date that employee chose to retire. The last misrepresentation about "for life" benefits which could have affected an employee's decision to retire must have occurred on or before the date that employee retired.[12]

The retirees contend that even if the breaching action by the Company was complete on the date of each

12. The court has ruled that the breach alleged is an action rather than an omission. However, a determination that the case is about omissions would lead to the same conclusion about the date the statute of limitations began to run. If the omission was Unisys's failure to correct an employee's misunderstanding of the lifetime guarantee, then the last date on which Unisys could have cured the breach was the day that employee retired thinking that his or her benefits were irrevocable "for life."

employee's retirement, the statute of limitations does not begin to run until all the elements of a cause of action for the breach of fiduciary duty claim, including resulting harm, are present. Retirees claim that the resulting harm did not occur until the termination of the plan.

The retirees are wrong for two reasons. First, they misunderstand what the resulting harm is in this case. Second, the case law on this section of the ERISA statute convinces the court that the plaintiff need not feel injury from the breach in order for the six-year statute to begin running.

The resulting harm in this case is not the termination of the old plans and the loss of benefits in 1992. The decision to terminate the old plans was not fiduciary conduct, and cannot be part of the breach of fiduciary duty. *See Curtiss-Wright,* 115 S.Ct. at 1228 (employers and other plan sponsors do not act in a fiduciary capacity when they amend or terminate a welfare benefits plan). Instead, the breach of fiduciary duty claim arises from misrepresentations about lifetime benefits, misrepresentations which may have caused plaintiffs to retire earlier than they would have if they had understood that their benefits might not be for life. Moreover, the loss of benefits to the retirees cannot be the "resulting harm" of the breach of fiduciary duty because the misrepresentations neither caused nor resulted in the loss of the benefits. The benefits were lost because of a non-fiduciary decision by Unisys to terminate the plans. The plan would have been terminated regardless of whether the misrepresentations had occurred; the breach of fiduciary duty involved was not the "but-for" cause or even a substantial factor in the decision to terminate the old plans. *Cf. Hein v.*

Federal Deposit Insurance Corp., 88 F.3d 210, 224 (3d Cir. 1996), *cert. denied sub nom. Hein v. McNeil*, 117 S.Ct. 683 (1997) ("causal link" between alleged breach of fiduciary duty and denial of benefits is required to support claim for the benefits). In this case, the resulting harm of the breach is that many employees may have chosen to work for an additional amount of time if they had known that their "lifetime" benefits were actually revocable.

Second, even if the resulting harm in this case were not felt until the 1992 change in benefit plans, this court would still find that the limitations period began on the date each plaintiff retired. Section 1113(1)(A)'s statute of limitations begins to run before the victim of a breach of fiduciary duty incurs any financial injury. In *Ziegler v. Connecticut General Life Ins. Co.*, 916 F.2d 548, 551-52 (9th Cir. 1990), the Ninth Circuit Court of Appeals specifically held that actual financial harm need not occur for a breach of fiduciary duty cause of action to accrue. In *Ziegler*, the defendant executed an investment agreement containing provisions which allegedly violated its fiduciary duties. The court rejected plaintiffs' assertion that the harm from the breach was merely theoretical until a later distribution was made, an assertion similar to the one made by the retirees in this case. Pointing out that "Congress intended to make fiduciaries culpable for certain ERISA violations even in the absence of actual injury to a plan or participant," the court held that the cause of action accrued when the challenged contract was executed, not when its consequences were felt by the plaintiffs. *Id.* at 551. The Court of Appeals for the District of Columbia Circuit has reached the same conclusion, ruling that § 1113(1)(A)'s statute of limitations begins to run on the

date when "there [is] no further action left to be taken by way of completing the alleged breach." *Larson,* 21 F.3d at 1171. The *Larson* court found the last action constituting part of the purported breach of fiduciary duty occurred when the defendant purchased an allegedly deficient annuity contract to substitute for a terminated benefits plan, not years later when the plaintiff was denied promised benefits. *Id.* at 1169, 1171.

In this circuit, precedent convinces me that the Third Circuit Court of Appeals would agree with the Ninth and District of Columbia Circuits. In *Gluck v. Unisys Corp.*, 960 F.2d 1168 (3d Cir. 1992) and *International Union of Electronic, Electric, Salaried, Machine and Furniture Workers, AFL-CIO v. Murata Erie North America, Inc.*, 980 F.2d 889 (3d Cir. 1992), the court of appeals was presented with plan sponsors who had amended their pension plans in manners allegedly violative of their fiduciary duties under ERISA. In both cases, after the plans were amended, the defendants took subsequent steps that caused a transfer of assets claimed by the plan participants. In both cases, the court held that § 1113(1)(A)'s statute of limitations began to run on the date that the plans were impermissibly amended, not the date when the assets were transferred away from the plan participants. *Murata,* 980 F.2d at 900; *Gluck,* 960 F.2d at 1178.

The *Gluck* and *Murata* opinions reveal that for purposes of the statute of limitations, the last action constituting part of the breach or violation occurs not on the date the harm is felt by the plan or its participants, but on the date the breach was complete. Plaintiffs need not suffer harm in the form of

denied or reduced benefits in order for the cause of action to accrue. In this case, the court has held that the termination of the plans in 1992 was not fiduciary conduct and was not a part of the alleged breach of fiduciary duty; the breach of duty consisted of misrepresentations about the permanency of the "lifetime" benefits. Therefore, the last date on which Unisys completed its alleged breach of fiduciary duty to an employee was the date it allowed that employee to retire thinking that the guarantee of lifetime benefits could not be changed.

D. Is the statute of limitations equitably tolled?

Finally, the retirees believe that even if their claims accrued on the date that each of them retired, the common-law doctrine of equitable tolling prevents their claims from being time-barred. "Equitable tolling functions to stop the statute of limitations from running where the claim's accrual date has already passed." *Oshiver v. Levin, Fishbein, Sedran & Berman*, 38 F.3d 1380, 1387 (3d Cir. 1994) (citation omitted). The doctrine is based on the equitable principle that, having unfairly lulled a plaintiff into inaction, a defendant may not profit from such wrongful conduct by invoking the statute of limitations defense. *LaVallee Northside Civic Ass'n v. Coastal Zone Management*, 866 F.2d 616, 625 (3d Cir. 1989). Plaintiffs urge that the policy interests behind equitable tolling are present in this case. For example, this is not a case of plaintiffs sitting on their rights; the retirees sued within weeks of learning about the change in benefit plans. Furthermore, failure to toll the statute of limitations means that the retirees were required to sue while Unisys' misrepresentations were ongoing and before

the retirees felt injury. Plaintiffs' strong arguments notwithstanding, this court finds that equitable tolling is not available in this case.

While federal statutes of limitations are generally subject to equitable tolling, Congress is free to supplant the common-law doctrine by providing otherwise in the statute. *Irwin v. Dept. of Veterans Affairs*, 498 U.S. 89, 95-96 (1990). The retirees present valid policy arguments in favor of tolling the statute in this case. However, at least one court has found that Congress considered arguments such as those of the retirees, and provided for those concerns by enacting the "fraud and concealment" provision into the law. In *Larson v. Northrop Corp.* 21 F.3d 1164, 1171 (D.C. Cir. 1994), the District of Columbia Circuit Court of Appeals was unable to find any relevant legislative history reflecting Congress' intent respecting § 1113. Endeavoring to determine Congressional intent, the court noted that the statute expressly includes a tolling-until-discovery rule in cases of fraud or concealment, "indicat[ing] that Congress had the discovery rule fully in mind but was deliberately omitting it from § 1113(1)(A)." *Id.* at 1172. The court held that § 1113 reflects a Congressional judgment that equitable tolling is not available to plaintiffs suing for an ERISA breach of fiduciary duty:

> We recognize that isolated situations can be imagined where it could seem harsh to penalize a beneficiary for not suing within six years: for example, . . . the beneficiary might not have discovered the breach within the six years. However, the special provision Congress made

> elsewhere in § 1113 for fraud or concealment . . . provides amelioration in the worst cases while, at the same time, indicating that Congress meant to toll the statute only in instances of fraud or concealment. . . . That the limitations period in § 1113(1)(a) is six years . . . suggests a judgment by Congress that when six years has passed after a breach or violation, and no fraud or concealment occurs, the value of repose will trump other interests, such as a plaintiff's right to seek a remedy.

Id. at 1171-72 (footnote omitted). Other courts have expressed doubt about equitable tolling's application to § 1113. *See Wolin v. Smith Barney Shearson, Inc.*, 83 F.3d 847, 850 (7th Cir. 1996) ("The explanation [for the explicit inclusion of a discovery rule only in cases or fraud or concealment] may be that Congress decided to substitute a fixed period of years for the open-ended judge-made doctrines of fraudulent concealment and equitable estoppel, thus promoting (as in statutes of repose) certainty of legal obligation.")[13]

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13. It should be noted that what is referred to in the Seventh Circuit as "equitable estoppel" is the same doctrine referred to in this circuit as "equitable tolling." *Oshiver*, 38 F.3d at 1389 n.7. Equitable tolling ("equitable estoppel" in the Seventh Circuit) refers, at least in the context of this case, to a doctrine tolling the statute of limitations where a plaintiff's delay is due to active deception by a defendant.

The Court of Appeals for the Seventh Circuit has a different use for the term "equitable tolling." As used in that circuit, "equitable

(Cont'd)

This court finds the reasoning of *Larson* persuasive, and agrees with the Court of Appeals for the D.C. Circuit that equitable tolling is not available under § 1113. As the *Larson* opinion explained, the Supreme Court has addressed the question of Congressional intent to supplant equitable tolling in a situation analogous to the ERISA context. *Larson,* 21 F.3d at 1174. In *Lampf, Pleva, Lipkind, Prupis & Petigrow v. Gilbertson,* 501 U.S. 350, 360-62 (1991), a securities case, the Court first determined that § 9(e) and § 18(c) of the Securities and Exchange Act of 1934 were the applicable statutes of limitation for private suits brought pursuant to § 10(b) of that act and several of its regulations. Turning to the plaintiffs' contention that equitable tolling should apply to the statute, the Court examined what it called the "1-and-3-year structure" of the two limitations periods, which provide that suits must be brought within one year of the discovery of the facts constituting the violation and within three years of the violation itself. *Id.* at 361.[14] The Court

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(Cont'd)
tolling" describes the doctrine of tolling the limitations period in cases where constructive knowledge activates the statute of limitations, but defendants have perpetrated a self-concealing wrong which the plaintiffs could not discover with reasonable diligence. This concept does not apply to ERISA breach of fiduciary duty cases because § 1113(2) makes it unnecessary — the statute requires actual, not merely constructive, knowledge of the breach in order to commence the three year statute of limitations. *Wolin,* 83 F.3d at 853; *see Gluck,* 960 F.2d at 1177-78.

14. Section 9(e) states in part:

> No action shall be maintained to enforce any liability created under this section, unless brought within one

(Cont'd)

held that equitable tolling would be inconsistent with the structure of the statute of limitations:

> The 1-year period, by its terms, begins after discovery of the facts constituting the violation, making tolling unnecessary. The 3-year limit is a period of repose inconsistent with tolling. . . . Because the purpose of the 3-year limitation is clearly to serve as a cutoff, we hold that tolling principles do not apply to that period.

Id. at 363.

This court agrees with *Larson* that *Lampf Pleva*'s reasoning prevents equitable tolling in ERISA breach of fiduciary duty cases. Section 1113 of ERISA has a 3-and-6-year structure similar to the 1-and-3-year structure of §§ 9(e) and 18(c) of the Securities and Exchange Act, and it seems sensible that the six-year limitation was meant as an outer

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(Cont'd)

> year after the discovery of the facts constituting the violation and within three years after such violation.

15 U.S.C. § 78i(e). Section 18(c) uses similar language:

> No action shall be maintained to enforce any liability created under this section unless brought within one year after the discovery of the facts constituting the cause of action and within three years after such cause of action accrued.

15 U.S.C. § 78r(c).

limit. Furthermore, as *Larson* recognizes, § 1113 provides an additional protection to plaintiffs that §§ 9(e) and 18(c) of the securities law do not, an exception to the limitations period in cases of fraud or concealment. *Larson*, 21 F.3d at 1175. The explicit inclusion of that exception, combined with the structure of the statute, convinces this court that the statute should only be tolled in cases of fraud or concealment. The court has already found that Unisys cannot reasonably be found to have engaged in fraud and concealment; therefore the limitations period cannot be tolled.[15] The claims of those plaintiffs who retired more than six years before the first action in this case was filed are time-barred.

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15. Even if the doctrine of equitable tolling were applicable to ERISA breach of fiduciary duty actions, the court would not apply the doctrine to this case. In this circuit, there are three principal, though not exclusive, situations in which equitable tolling may be appropriate: (1) where the defendant has actively misled the plaintiffs respecting their cause of action; (2) where the plaintiffs have in an extraordinary way been prevented from asserting their rights; or (3) where plaintiffs have timely asserted their rights but in the wrong forum. *Oshiver*, 38 F.3d at 1387. (citations omitted). The first situation is the closest fit to this case. Unisys' misrepresentations may have "lulled the plaintiff[s] into foregoing prompt attempts to vindicate [their] rights." *Id.* (citations omitted). However, unlike most of the cases in which equitable tolling has been applied, this case does not involve fraudulent or pretextual statements by Unisys. If it did, the statutory six year tolling for fraud or concealment would apply. Attempting to apply the doctrine of equitable tolling to the facts of this case reveals that the doctrine does not make sense in connection with § 1113: by including a six year tolling period for fraud or concealment, the statute already provides tolling in the majority of cases in which equitable tolling would actually apply.

V. RETIREES WHO CANNOT PROVE AN ESSENTIAL ELEMENT OF THEIR CLAIMS

In addition to its statute of limitations arguments, Unisys asks this court to grant summary judgment against all retirees who Unisys contends will not be able to prove all four elements of their claim. Specifically, Unisys asserts that plaintiffs who retired before "lifetime" medical benefits were offered in their divisions, those who retired when the company still enforced a mandatory retirement age of 65, and those who left their company's employ involuntarily because of disability, layoffs, or other reasons cannot prove an essential element of their claim.[16] These plaintiffs cannot prove that the breach of fiduciary duty led them to retire earlier than they otherwise would have. Therefore, Unisys argues, they cannot demonstrate the "resulting harm" required for a breach of fiduciary duty claim, and summary judgment should be entered against them.

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16. Most of the retirees addressed in Unisys' argument in this regard are also plaintiffs who retired more than six years before the first lawsuits in this case were filed. For example, until the Age Discrimination in Employment Act ("ADEA") was enacted, Sperry required all its employees to retire by age 65. In response to the ADEA's prohibition of involuntary retirement based on age, 29 U.S.C. § 623(f)(2), Sperry eliminated its mandatory retirement age in 1979. (Affidavit of Jay W. Brubaker, Def. Exh. 7, ¶ 4, Def. Append. to Mot. for Partial Summ. Judg. on Claims of Sperry Retirees). Plaintiffs who retired when the mandatory retirement age was 65 would by necessity also fall into the category of plaintiffs who retired more than six years before the first suits were filed in this case. Therefore, the court has already held that many of these claims are time-barred. Nevertheless, the court proceeds with the analysis to cover those plaintiffs who allegedly cannot prove an element of their claims but who are not time-barred.

Appendix B

Plaintiffs have responded to Unisys' argument by providing a host of affidavits from retirees who allegedly made important decisions based on the "lifetime" misrepresentations. For example, some members of the class declined other employment opportunities based on their reliance on the representations of lifetime benefits, others chose to forego the opportunity to purchase supplemental health insurance for themselves or their spouses, and others made financial decisions for their retirement based on the lifetime representations. *See, e.g.* Declaration of James Moha, Sperry Pltf. Exh. O, ¶ 8, Append. to Sperry Pltf. Mem. in Opp. to Partial Summ. Judg. (did not participate in other health plans); Declaration of Philip Desilets, Sperry Pltf. Exh. F, ¶ 9, Append. to Sperry Pltf. Mem. in Opp. to Partial Summ. Judg. (created a post-retirement budget based on misrepresentations, and if not for misrepresentations would have secured other employment after laid off from Sperry). Many of the retirees are now too old to obtain supplemental insurance or to work. Plaintiffs argue that the retirees who made decisions beyond the one to retire based on Unisys' misrepresentations can show the resulting harm required to succeed on a breach of fiduciary duty claim. Plaintiffs also remind the court that Unisys was not free to mislead any plan participant, whether active employee or retiree.

The issue for this court, then, is whether the "harm" suffered by the retirees who made decisions other than the one to retire based on Unisys' misrepresentations is the type of "resulting harm" capable of supporting a breach of fiduciary duty claim in the context of this case. Thus far in this case, the "harm" considered actionable by this court and the court of appeals has been the decision, made without full information, to retire:

> Unisys had knowledge that its employees believed the assurances of lifetime benefits they had been given and were making *retirement decisions* based on their understanding [that the benefits would be stable for life]. . . . Unisys' executives were aware that the lifetime medical benefit was an important consideration for employees who were considering *when to retire*. This evidence established that the company knew that employees *accelerated their retirement plans* because of the belief that by retiring at a certain point in time, they would "lock in" the lifetime coverage that they had under the current plan. . . . Unisys was aware of the fact that retirees were *electing to retire* based on this understanding. . . .

In re Unisys, 57 F.3d at 1266 (emphasis added). The court of appeals used similar language in *Fischer v. Philadelphia Electric Co.*, 994 F.2d 130 (3d Cir.), *cert. denied*, 510 U.S. 1020 (1993), in which it held that a plan administrator breaches its fiduciary duty under ERISA if it makes material misrepresentations to plan participants about proposed changes to benefit plans. The court stated that a misrepresentation would be considered "material" only if there was a "substantial likelihood that it would mislead a reasonable employee in making an adequately informed decision *about if and when to retire*." *Id.* at 135 (emphasis added).

More than the court's choice of phrase guides this decision. To allow retirees who did not retire based on the lifetime language to maintain a breach of fiduciary duty in

this case would subvert the holdings of this court and the court of appeals in this case. Adoption of the retirees' position would resurrect the claim for equitable estoppel, which this court has previously rejected and has refused to reinstate. *In re Unisys*, 837 F. Supp. at 680-81; *In re Unisys*, 1994 WL 284079, at *28, *aff'd*, 58 F.3d at 907-08. There simply has been no mention by either this court or the court of appeals that the fiduciary duties implicated in this case arise in connection with decisions other than the one about when to retire.

This court originally granted summary judgment on the retirees' breach of fiduciary duty claims. I reinstated them because of a window opened by the Third Circuit Court of Appeals in *Bixler v. Central Pennsylvania Teamsters Health and Welfare Fund*, 12 F.3d 1292 (3d Cir. 1994). In that case, the court of appeals recognized a direct cause of action under 29 U.S.C. § 1132(a)(3)(B) for breach of fiduciary duty when a plan administrator failed to advise the plaintiff, a widow of a plan participant, of information concerning COBRA election rights which may have been material to her decisions regarding whether to exercise those rights. *Id.* at 1302. The court of appeals found evidence that the employer knew that the widow had substantial unpaid medical expenses and that she could have received reimbursement for those expenses by signing and returning a COBRA notice her husband had received. *Id.* While the employer did not lie to the widow about the availability of the benefits, it did fail to convey the information to her when she contacted it about another issue. The widow then failed to elect to continue her medical coverage under COBRA. The court of appeals held that the employer may have breached its fiduciary duty by not

providing full information that the employer had reason to know would be material to the plaintiff's decisions. *Id.* at 1302-03.

This court, believing that the reasoning of *Bixler* and other recent appellate decisions might support the retirees' claims for breach of fiduciary duty, reinstated the Sperry regular retirees' breach of fiduciary duty claims. However, I certified the case for interlocutory appeal because of the "uncertainty of the contours of *Bixler*." *In re Unisys,* 1994 WL 284079, at *27. When the court of appeals affirmed the reinstatement of the fiduciary claims, that court confronted two governing principles of ERISA cases. The first is the "well-established policy disfavoring informal plan amendments." *In re Unisys,* 57 F.3d at 1264. The second is the paramount importance of the summary plan description ("SPD") as the primary means of informing plan participants of the terms of their benefit plans. *See Curtiss-Wright,* 115 S.Ct. at 1230 (emphasizing the importance of SPDs for communicating essential elements of the plan to participants). The court of appeals expanded its ruling in *Bixler* because of the extraordinary history of misrepresentations in this case, but it was careful to emphasize that it was not creating a "precedent for any beneficiary to make claims beyond those provided in a plan." *In re Unisys,* 57 F.3d at 1265 (citation omitted). In discussing the evidence of resulting harm in this case, the court relied solely on the evidence that the misrepresentations "influenced [plaintiffs'] decisions to retire," *Id.* at 1266; it did not imply that other types of harm would support breach of fiduciary duty claims.

Appendix B

In allowing the breach of fiduciary claims to go forward, this court and the Court of Appeals for the Third Circuit have essentially held that reliance by the employees on the misrepresentations of Unisys, while not "reasonable reliance" for purposes of a claim of equitable estoppel, can still support a claim for breach of fiduciary duty. In a sense, the rulings in this case excuse the plan participants from their failure to read their summary plan documents in the limited context of making the retirement decision: because of the breach of duty, the employees may have retired earlier than they otherwise would have, and even if their reliance on the misrepresentations was not reasonable, the reliance supports a breach of fiduciary duty claim because it was at least partially the fault of Unisys.

The "unreasonable" reliance excused here is narrow, and supports a breach of fiduciary duty claim only in certain limited circumstances — in this case, where the employees retired earlier than they might have had they not been misled by the lifetime misrepresentations. This court believes that expanding the concept of "resulting harm" in this case to the types of reliance alleged in the retirees' affidavits would create an unjustified expansion of the narrow holdings of this court, and would by indirection reinstate the claims for equitable estoppel.

Plaintiffs rely on *In re Unisys Savings Plan Litigation,* 74 F.3d 420 (3d Cir.), *cert denied sub nom. Unisys Corp. v. Meinhardt,* 117 S.Ct. 56 (1996), and *Curcio v. John Hancock Mut. Life Ins. Co.,* 33 F.3d 226 (3d Cir. 1994) in support of their arguments that breach of fiduciary duty claims can proceed where plan participants rely on incomplete or

inaccurate representations from plan administrators to make decisions about investments or insurance coverage. These cases are distinguishable for two important reasons. First, unlike the retirees in this case, the plaintiffs in *Curcio* and *Unisys Savings Plan* did not have available SPDs which unambiguously provided the material information. For the *Curcio* and *Unisys Savings Plan* plaintiffs, a careful reading of the SPD by the average plan participant would not have revealed the material information. *Curcio,* 33 F.3d at 236-37; *Unisys Savings Plan,* 74 F.3d at 431, 447.[17]

Second, and more importantly, in *Curcio* and *Unisys Savings Plan* the nexus between the misrepresentations and the reliance was close. The Curcios did not purchase insurance (and then did not have enough insurance) because they relied on misrepresentations about insurance policies the Curcios already had; the Unisys Savings Plan participants alleged that they made poor investment decisions (and then lost money on their investments) because they relied on the defendant's silence regarding material investment risks. These cases are consistent with the decision by this court that there is a close nexus between Unisys' misrepresentations about lifetime benefits and Plaintiffs' reliance on those representations in determining when to retire (and then retiring earlier than they would have in the

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17. In fact, the court of appeals in *Curcio* entered summary judgment for the plaintiff on an equitable estoppel theory. The reliance of plaintiff on the company's inaccurate representations was therefore reasonable. By contrast, in this case, the retirees' estoppel claims were denied because the retirees' reliance on the lifetime promises, in the face of unambiguous SPDs, was not reasonable.

absence of misrepresentations). However, the nexus between Unisys' misrepresentations about the duration of the lifetime benefits guarantee and the other types of reliance presented to the court, such as forsaken opportunities for insurance, employment, and investment, is not as close. This nexus, while it might suffice as reliance in an equitable estoppel claim, is simply too tenuous to constitute the resulting harm in a breach of fiduciary duty claim. The misrepresentations must be material ones; the harm must flow directly from the breach. The court of appeals has held that "[i]n the present context, a misrepresentation is material if there is a substantial likelihood that it would mislead a reasonable employee in making an adequately informed retirement decision." *In re Unisys,* 57 F.3d at 1264. Given the facts of this case, this court will not expand the concept of materiality to include other types of reliance beyond the decision to retire.

VI. EQUITABLE REMEDIES

Unisys has moved for summary judgment against all retirees "insofar as they seek restitution or specific performance in the form of vested medical benefits." Def. Mot. Partial Summ. Judg. on Claims of Sperry Regular Retirees ¶ 4; Def. Mot. Partial Summ. Judg. on Claims of Burroughs and Unisys Regular Retirees ¶ 3. The parties have fully briefed and argued the issue of what equitable remedies are properly available to the retirees who remain in the class and who prove all the elements of their breach of fiduciary duty claims. The court will address equitable remedies in a separate opinion. Defendant's Motions for Partial Summary Judgment regarding the equitable remedies available in this case are therefore deferred.

Appendix B

VII. SPERRY RETIREES' MOTION FOR SUMMARY JUDGMENT

As stated earlier in this opinion, the Court of Appeals for the Third Circuit has established four elements for each plaintiff to prove in order to succeed on his or her breach of fiduciary duty claim: proof of fiduciary status, misrepresentations, company knowledge of the confusion, and resulting harm to the plaintiff. The Sperry retirees have moved for summary judgment, asking the court to hold that there is no genuine factual dispute preventing the legal conclusion that the Sperry retirees have proved all four elements of their claims.

When this court reinstated the Sperry plaintiffs' breach of fiduciary duty claims, I explained that they had not been directly before the court during the trial of the contract and equitable estoppel claims. I did not hold that each plaintiff had proved his claim of breach of fiduciary duty; in fact, in granting reconsideration of them, I held:

> [B]ecause some plaintiffs have stronger cases than others based on their specific inquiries and the information given to them personally, the court finds that subclasses, and possibly even individual hearings, will be necessary to adjudicate these claims.

In re Unisys, 1994 WL 284079, at *27.

Because at least one element of the claims, resulting harm, has not been proved on a class-wide basis, summary

judgment cannot be entered for the Sperry plaintiffs. As has been discussed throughout this opinion, the harm contemplated by this court is a retiree's premature decision to retire based on a false sense of the security of the lifetime benefits promised by Unisys. The court finds that there is a genuine factual dispute about how many of the retirees actually suffered this type of harm. Additional discovery and hearings will be necessary to determine the extent of the reliance by and resulting harm to the retirees.

For the purpose of guiding the future discovery and proceedings, the court notes that the first element of the claims, proof of fiduciary status, has been established on a class-wide basis. The court of appeals has held:

> There is no question that both Sperry and later Unisys were acting as plan administrators, and thus were acting in a fiduciary capacity, when they made the material misrepresentations that support the claim for breach of fiduciary duty in this case.

In re Unisys, 57 F.3d at 1261 n.10. The second element, company misrepresentations, has also been proved on a class-wide basis for all Sperry retirees.[18] This court found, and the court of appeals agreed, that Unisys "both actively and affirmatively, systematically misinformed its employees about the duration of their benefits." *Id.* at 1266. There is no

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18. This conclusion does not apply to those plaintiffs who retired before "lifetime" language was used in their division. The court has granted summary judgment for Unisys against all retirees who retired before the misrepresentations were made to them.

genuine factual dispute that the retirees all heard or read, at least once, the lifetime benefit language.

The Sperry retirees' Motion for Summary Judgment is denied.

VIII. CONCLUSION

As this court has previously observed, this case comes at time when our country is grappling with the cost of medical care. This case arose because Unisys was faced with revised accounting standards, a more competitive global market, an increase in longevity, and rising health care costs. In the future, a case like this is unlikely to arise not only because employers will be more careful about communicating the nature and impact of reservation of rights clauses to their employees, but also because employers can no longer afford to offer the type of lifetime benefits which Unisys once provided.

The retirees in this litigation are individuals who worked, in some cases, for thirty or forty years for an employer in whom they placed great trust. The corporations which are defendants in this case provided generous medical benefits and would probably have continued to do so if costs had not so escalated and if accounting rules had not changed. This court has been faced with a case in which there is no villain, and a case in which both sides will suffer serious financial loss if they do not prevail. Faced with this difficult situation, a careful study of the text and case law of ERISA convinces the court that the statute of limitations bars the claims of many of the retirees, and that many of the retirees cannot

demonstrate the resulting harm required to maintain a breach of fiduciary duty claim.

An appropriate order follows.

BY THE COURT:

s/ Edward N. Cahn
Edward N. Cahn, Chief Judge

Appendix B

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

MDL NO. 969

IN RE UNISYS CORPORATION RETIREE
MEDICAL BENEFITS ERISA LITIGATION

THIS DOCUMENT RELATES TO: ALL ACTIONS

ORDER

AND NOW, this 10th day of March, 1997, upon consideration of the following motions and the opposition thereto:

(1) Defendant Unisys Corporation's Motion for Partial Summary Judgment on Breach of Fiduciary Duty Claims of Sperry Regular Retirees; (2) Defendant Unisys Corporation's Motion for Partial Summary Judgment on Breach of Fiduciary Duty Claims of the Burroughs and Unisys Regular Retirees; and (3) Plaintiff Sperry Regular Retirees' Motion for Summary Judgment; IT IS ORDERED as follows:

1. Summary Judgment is GRANTED in favor of Unisys on the claims of all Sperry regular retirees who retired before November 17, 1986, six years before the first lawsuits were filed by the Sperry retirees.

2. Summary Judgment is GRANTED in favor of Unisys on the claims of all Sperry regular retirees who retired before lifetime medical benefits were offered in their operating division.

3. Summary Judgment is GRANTED in favor of Unisys on the claims of all Sperry regular retirees whose employment with Sperry ended involuntarily as a result of being laid off, fired or disabled before they retired, or as a result of being forced to retire at age 65 pursuant to Sperry's then-lawful mandatory retirement age.

4. Summary Judgment is GRANTED in favor of Unisys on the claims of all Burroughs regular retirees who retired before December 3, 1986, six years before the first lawsuits were filed by the Burroughs retirees.

5. Summary Judgment is GRANTED in favor of Unisys on the claims of all Burroughs and Unisys regular retirees whose employment with Burroughs or Unisys ended involuntarily as a result of being laid off, fired or disabled before they retired, or as a result of being forced to retire at age 65 pursuant to Burroughs' then-lawful mandatory retirement age.

6. The Sperry Regular Retirees' Motion for Summary Judgment is DENIED.

7. Unisys shall provide the attorneys representing the Sperry, Burroughs and Unisys retirees with a list of those retirees affected by this Order within fourteen (14) days of the date of this Order. Counsel for the Sperry, Burroughs and Unisys retirees shall then have fourteen (14) days to review that list and raise any objections to the accuracy of the list with Unisys. The parties shall then make their best efforts to resolve any disputes

regarding the list, and shall submit an agreed-upon list, as well as a list of disputed retirees, to the Court no later than April 21, 1997.

BY THE COURT:

s/ Edward N. Cahn
Edward N. Cahn, Chief Judge

APPENDIX C — ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT DENYING PETITION FOR REHEARING DATED MAY 30, 2001

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

NO. 99-1929

IN RE: UNISYS CORP. RETIREE MEDICAL BENEFIT "ERISA" LITIGATION; FREDERICK E. TONNIES; WILLIAM M. LEONHARDT; DAVID S. KAHL; ROBERT E. WILT; CLAY A. BERNICHON; SOLVEIG TSCHANN; FREDERICK W. HORPE; LUDSON F. WORSHAM; EDWIN MARJALA; KENYON T. BEMENT; DONALD E. WAGNER; LUCIUS O. BROWNE, DONALD F. FABRY; THOMAS L. DURKIN; BERNARD J. HART; RONALD R. BENNETT; HERMAN HEIN; DONALD L. THOMPSON, individually and on behalf of all members of the Sperry, Burroughs and Unisys Classes,

Appellants

SUR PETITION FOR REHEARING

BEFORE: BECKER, *Chief Circuit Judge*, SLOVITER, MANSMANN, SCIRICA, NYGAARD, ALITO, ROTH, McKEE, BARRY, AMBRO, FUENTES, and STAPLETON, *Circuit Judges*[1]

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1. Judge Walter K. Stapleton's vote is limited to panel rehearing only.

Appendix C

The Petition for rehearing filed [by] the Appellant in the above-entitled matter, having been submitted to the judges who participated in the decision of this court and to all other available circuit judges in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges in regular active service not having voted for rehearing by this court en banc, the Petition for Rehearing is hereby DENIED.

It is so ordered.

By the Court,

_____

United States Circuit Judge

DATED: 30 MAY 2001

Supreme Court, U.S.
FILED
OCT 19 2001
OFFICE OF THE CLERK

No. 01-367

IN THE

Supreme Court of the United States

FREDERICK E. TONNIES; WILLIAM M. LEONHARDT; DAVID S. KAHL; ROBERT E. WILT; CLAY A. BERNICHON; SOLVEIG TSCHANN; FREDERICK W. HOPPE; LUDSON F. WORSHAM; EDWIN MARJALA; KENYON T. BEMENT; DONALD E. WAGNER; LUCIUS O. BROWNE, DONALD F. FABRY; THOMAS L. DURKIN, and BERNARD J. HART; individually and on behalf of all affected members of the Sperry, and Burroughs Classes,

Petitioners,

v.

UNISYS CORPORATION,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SUPPLEMENTAL BRIEF FOR PETITIONERS

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SUPPLEMENTAL BRIEF FOR PETITIONERS

Petitioners Frederick E. Tonnies, et al., submit this Supplemental Brief pursuant to Rule 15.8[1] to apprise the Court of two additional reasons for granting review in this case.

First, the U.S. Court of Appeals for the Second Circuit issued a decision on October 10, 2001 in *Caputo, et al. v. Pfizer, Inc.*, No. 00-7483, 2001 WL 1191501, 2001 U.S. App. LEXIS 21707 (2d Cir. October 10, 2001), which conflicts squarely with the ruling below on the important question presented regarding the "fraud or concealment" provision of ERISA's statute of limitations. The new decision thus deepens the circuit conflicts noted in the Petition and dramatically illustrates that review is warranted.

Second, *TRW, Inc. v. Adelaide Andrews*, No. 00-1045 (argued October 9, 2001), presents questions regarding claim accrual and the application of limitations rules under another civil statute, and the awaited outcome of that case potentially will relate to some of the issues raised here. The Court should, accordingly, note this relationship between the cases and consider whether to defer disposition of the present Petition pending the decision in *Andrews*.

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1. On September 28, 2001, Respondent Unisys Corporation filed a Cross-Petition for a Writ of Certiorari. *Unisys Corporation v. Frederick E. Tonnies, et al.*, No. 01-554. Although not clearly denoted as such in conformity with Rule 12.5, the Cross-Petition is conditional. Respondent Unisys did not file any response to the Petition in this main case (No. 01-367), but instead filed a waiver of response on October 5, 2001. As Petitioners had no occasion to submit a Reply Brief in which they could bring the matters discussed herein to the Court's attention, they submit this Supplemental Brief instead.

Further, inasmuch as Petitioners believe that the questions presented by Unisys in its Conditional Cross-Petition were not fully raised in the lower court and were not addressed by that court, Petitioners at this time are waiving the filing of a brief in response to the Conditional Cross-Petition.

A. The Second Circuit Has Expressly Rejected the Ruling by the Third Circuit on ERISA's "Fraud or Concealment" Provision, Deepening the Circuit Conflict Noted in the Petition in this Case.

On October 10, 2001, the Second Circuit issued its decision in *Caputo, et al. v. Pfizer, Inc.*, No. 00-7483, F.3d, 2001 WL 1191501, 2001 U.S. App. LEXIS 21707 (2d Cir. October 10, 2001).

In *Caputo*, the Second Circuit reversed the grant of summary judgment against employees who claimed that their former employer violated ERISA's fiduciary duty provisions, 29 U.S.C. § 1104(a), by misrepresenting its intentions to later offer an enhanced special early retirement program. Having been led to believe, falsely, that no such program would be forthcoming, the employees took normal retirements and thereby lost the opportunity to accept the superior terms of the enhanced program that was announced several months later. 2001 WL 1191501 at *1-3, 2001 U.S. App. LEXIS 21707 at *3-10.

The employer moved for summary judgment on the ground that the employees' claims, which were filed approximately five years after the announcement of the enhanced program, were time-barred under the ERISA statute of limitations governing fiduciary breach claims, 29 U.S.C. § 1113. The district court granted the motion, ruling that the claims were not governed by the provision applicable to "case[s] of fraud or concealment" but instead were governed solely by the alternate three-year statute which ran from the date of "actual knowledge" and that this provision barred the claims. 2001 WL 1191501 at *4, 2001 U.S. App. LEXIS 21707 at *12.

The Second Circuit disagreed with both rulings and vacated the summary judgment. As pertinent to the Petition, the court ruled that:

1. The rulings of other circuits, including the Third Circuit's decision in this case, have improperly "fuse[d] the phrase 'fraud

or concealment' into the single term 'fraudulent concealment.'" The genesis of this erroneous rule was "a footnote in a district court opinion that cites no legal support for the proposition." 2001 WL 1191501 at *6 & n.2, 2001 U.S. App. LEXIS 21707 at *16-17 & n.2, *citing Schaefer v. Arkansas Med. Society*, 853 F.2d 1487, 1491-92 (8th Cir. 1988), which in turn relied on *Foltz v. U.S. News and World Report, Inc.*, 663 F. Supp. 1494, 1537 n.66 (D.D.C. 1987). *Compare* Petition at 15-17.

2. The "fraud or concealment" provision does not actually toll the statute of limitations, but instead "prescribes a separate statute of limitations of six years from the date of discovery." 2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *17.

3. Principles of statutory interpretation "counsel strongly against merging the two terms" of fraud and concealment. 2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *18; *compare* Petition at 8 (quoting separate opinion of Judge Mansmann), 12-14.

4. The plain language of the statute states that it is applicable to cases of "fraud or concealment" and at the time of ERISA's enactment, the definitions of "fraud" and "concealment" respectively included (a) false representations "by false or misleading allegations or by concealment of that which should have been disclosed" and (b) the "withholding of something which one knows and which one, in duty, is bound to reveal." 2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *18-19; *compare* Petition at 10-11 & n.2 (canvassing state trust law cases).

5. Giving each term its required "independent significance," the six year "fraud or concealment" provision:

> should be applied to cases in which a fiduciary: (1) breached its duty by making a knowing misrepresentation or omission of a material fact to induce an employee/beneficiary to act to his

> detriment; or (2) engaged in acts to hinder the discovery of a breach of fiduciary duty. *In re Unisys Corp. [Retiree Medical Benefit ERISA Litigation]*, 242 F.3d [497] at 513-16 [(3d Cir. 2001)] (Mansmann, J., concurring in the result in part).

2001 WL 1191501 at *6, 2001 U.S. App. LEXIS 21707 at *20.

6. This reading was "amply supported by the provision's legislative history." Based on its review of an earlier draft of the "fraud or concealment" provision, the court concluded that, "Clearly, Congress intended to provide a lengthier statute of limitations where the fiduciary breached its duty by misrepresenting or failing to disclose a material fact that ERISA required the fiduciary to disclose, most likely because such violations would be difficult to discover." 2001 WL 1191501 at *7, 2001 U.S. App. LEXIS 21707 at *20-21.

7. "Fraud" encompasses a fiduciary's "affirmative misrepresentation, omission or concealment of a material fact." The independent term "concealment" incorporates the distinct doctrine of "fraudulent concealment." 2001 WL 1191501 at *7, 2001 U.S. App. LEXIS 21707 at *21; *compare* Petition at 12-14.

In summary, this new decision of the Second Circuit represents a further split among the circuits on the proper application of ERISA's "fraud or concealment" limitations provision. *Caputo* is the first decision rendered by another circuit that addresses the decision below. It squarely rejects the analysis adopted by Judges Stapleton and Nygaard and, instead, adopts the analysis expressed in Judge Mansmann's separate opinion.

B. The Court's Decision in *TRW v. Andrews* May Formulate Rules Pertinent to the Question of Claim Accrual That Is Presented by the Petition.

On October 9, 2001 the Court heard argument in *TRW, Inc. v. Adelaide Andrews*, No. 00-1045 (argued October 9, 2001). That case presents questions regarding claim accrual and application of the two-year limitations provision of the Fair Credit Reporting Act, 15 U.S.C. § 1681p. The lower court had ruled that this express limitations provision was also governed by a general discovery rule implied under federal law. *See Andrews v. TRW, Inc.*, 225 F.3d 1063, 1066-67 (9th Cir. 2000).

Although this case does not raise any question of the sort raised in *Andrews* with respect to the propriety of interpreting a statute to encompass an *implicit* discovery rule exception, *Andrews* nevertheless involves subsidiary issues regarding the accrual of claims for disclosures of incorrect credit information that were sued upon more than two years after the disclosures but within two years of a denial of credit based upon that information. These issues relate to the second question presented here — when the "last action which constituted a part of the breach or violation," 29 U.S.C. § 1113(1)(A), occurs for purposes of commencing ERISA's alternate six-year statute of limitations.

Petitioners therefore believe that the forthcoming decision of *Andrews* may have some bearing on issues raised by their Petition. Petitioners accordingly request that the Court note the potential relatedness between the two cases and, if appropriate, defer disposition of the Petition until *Andrews* has been decided.

CONCLUSION

For the reasons stated here and in the Petition, Petitioners respectfully pray that the Petition be granted and that a writ of certiorari issue to the Court of Appeals for the Third Circuit.

Respectfully submitted,

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